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JAMES R BR[illegible] Clerk

IN THE

Supreme Court of the United States

No. 376

FIVE BORO CONSTRUCTION CORPORATION,

Petitioner,

—against—

ARTHUR J. GOLDBERG, Secretary of Labor, United States Department of Labor,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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(a) Reported Below

In the District Court, District of Puerto Rico

14 W. H. Cases (Bureau of National Affairs, Wage and Hour Cases) pp. 720-721;
41 Labor Cases ¶31,011.

In the Court of Appeals, First Circuit

15 W. H. Cases 145-147, No. 5747, —— F. (2d) ——.

(b) Statement of Grounds of Jurisdiction

(i) The judgment sought to be reviewed was entered June 15, 1961.

(ii) There was no petition for rehearing and no request for an extension of time within which to petition for certiorari.

(iii) The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 U. S. C. §1254.

(c) Questions Presented

1. Should employment in the construction of buildings to become part of a communications relay center in Puerto Rico, for use exclusively in the national defense of the United States, be deemed covered by the Fair Labor Standards Act, rather than by the Mandatory Decrees of the Minimum Wage Board of the Commonwealth of Puerto Rico?

2. Should such employment be covered by the Fair Labor Standards Act rather than by the Mandatory Decrees of the Minimum Wage Board of the Commonwealth of Puerto Rico, where it appears that neither a facility of commerce nor a facility for the production of goods for commerce is under construction, but only buildings to house radio relay equipment and troops for the maximal protection of the United States from missile attack?

3. Should such employment be deemed covered by the Fair Labor Standards Act rather than by the Mandatory Decrees of the Commonwealth of Puerto Rico, where even upon completion of the construction work, the facilities will remain unusable for defense purposes, until further installations are made?

(d) Statutes, Ordinances or Regulations Which the the Case Involves (Pertinent Text Set Forth in Appendix)

29 U. S. C. §202, 1958 ed. p. 5330.
29 U. S. C. §203, 1958 ed. p. 5331.
29 U. S. C. §205, 1958 ed. pp. 5332-3.
29 U. S. C. §206, 1958 ed. pp. 5333-4.

29 U. S. C. §207, 1958 ed. pp. 5334-6.
29 U. S. C. §215(a)(2), 1958 ed. p. 5342.
29 U. S. C. §217, 1958 ed. p. 5344.
29 C. F. R. former Part 671 (bound volume, p. 213).
29 C. F. R. former Part 672 (bound volume, pp. 213-4).
29 C. F. R. Part 671 (pocket supplement, pp. 318-319).
29 C. F. R. Part 672 (pocket supplement, pp. 319-321).
29 Laws of Puerto Rico Anno. §245 (suppl., p. 76).

Mandatory Decree No. 44, Minimum Wage Board, Commonwealth of Puerto Rico (Mimeograph, p. 1).

(e) Statement of the Case

Petitioner on April 16, 1959 and June 30, 1959 entered respectively into two contracts with the U. S. Army Engineers for the construction of a Communications Relay Center at Camp Losey, Puerto Rico.

Radio studies had led the Government to the conclusion that transmission of east-west signals at temperate latitudes was subject to intereference by sun-spots; that equatorial east-west transmission was far more effective. Keenly aware of its duties and of the potentiality and speed of modern weapons, the Government ordered construction of the Communications Relay Center at Puerto Rico as part of a series of four equatorial stations, the other three being at Hawaii, in the Philippines and at Asmara, near the Red Sea. As the Government's witness, Lieut. Col. Charles C. Roder, U. S. Army, the only person who testified, put it:

> "At the close of World War II, with the advent of the V-2 rocket in Germany, high speed missiles traveling at the speed of 2,000 miles an hour, with the need for greater communications, more reliability in this day and age, with as I say 2,000-miles-an-hour mis-

siles, a study was begun by the Signal Corps to overcome and make more reliable world-wide communications. They found that radio transmission at the poles east and west was impossible, that the farther they got toward the equator, the greater the reliability of transmission east and west. They also discovered that if they transmitted north and south the reliability was of a high order.

• • • • •

On this study was developed the theory of 'Tropi-Comma', for tropical communications: the theory that they would transmit north and south to a tropical belt approximately 20 degrees north and south of the equator, transmit east and west within this belt, and transmit north and south again to other points in the world. By so doing they would eliminate the hazards of magnetic storms, and the reliability of communications would be of a high order. It is a well known fact that these sun spots cause radio interruptions to radio communications. These are observable by all nations. It is only a matter of • • • [time] for some nation to observe these sun spots, predict their effect seven days hence on communications, launch an attack in this natural blackout, and the United States would have lost a war. With this theory in mind they began this network of stations. One was established already in Hawaii, a key point, during World War II. The Philippines station was used during World War II, and required but little expansion to fall within this tropical communications belt. In 1954, the station in Asmara, Eritrea, was completed. This left a tremendous gap in this tropical communications practically south of Washington. Puerto Rico was chosen to establish this station in this world-wide network, to close this gap.

The Court: That's the fourth station?

A. The fourth station. The scope of communications since World War II has increased tremendously. We can get much more communications on few channels. Puerto Rico will be within this belt, transmitting essentially east and west, to Hawaii, one direction-wise, to Asmara, Eritrea, the other, and north and south to whatever stations are selected in the United States.

The Court: Puerto Rico will transmit north and south also?

A. From Puerto Rico we go North, South, East, and West, to the main avenue of communications. We are a relay station. We don't originate traffic. We merely receive a signal from some outlying post, in the technical phrase 'clean it up', re-shape the wave and eliminate static, and retransmit it. These circuits will come through, it will be done mechanically, we won't touch them. We will operate on a tape basis. Our piece of tape comes out of a teletype machine, suppose it comes from Asmara, Eritrea and says Washington. We have [to] put it in the Washington machine. We have this much flexibility. The circuits will be used by all agencies of the United States Government such as the Central Intelligence Agency, the Federal Bureau of Investigation, the Air Force if they require it, the Navy if they require it, and of course the Army for their strategic communications".

It was added that the Army was "getting ready to launch a communications satellite which will circle the earth every two hours. We will lead this satellite up, take traffic from it, and put it in our existing system, so this will relieve a lot of other networks" (*Testimony of Colonel Roder*, Record Appendix, pp. 13-16).

To construct the facilities necessary for this transmission, two contracts were awarded by the United States Army Caribbean Signal Agency to Petitioner, Five Boro Construction Corporation.

"We are building", said Colonel Roder (Record Appendix, p. 11),

> "a radio relay station, and the two contracts break down this operation into two phases, the first increment and the second increment. The first increment is the technical buildings, the receiver, the transmitter building, and the communications center building, with their associated emergency power stations. The second increment is the support buildings, mess hall, troop billets, administration building, motor pools, gas stations, water system, sewage system, etc.
>
> The Court: What do you call that?
>
> A. The support buildings. It makes possible the operation of the technical part.
>
> The Court: Those are accessory to the other one?
>
> A. That's exactly right".

> "And after the buildings were created, and Five Boro were no longer on the project, some other agency or contractor was to bring in equipment and supplies or whatever was needed in order to transmit and receive messages? Correct" (At p. 19).
>
> "And no transmission of any messages could take place at the completion of [Five Boro's] contract, based solely on the work done by the defendant? That is correct" (At p. 20).

It was stipulated that the Petitioner was paying its employees at the rate provided by the Minimum Wage

Board of the Commonwealth of Puerto Rico, or over 62 cents an hour; but less than the minimum wages prescribed under the Fair Labor Standards Act by the wage order for the Construction, Business Service, Motion Picture and Miscellaneous Industries in Puerto Rico.

Fort Allen, the location of the work, was never an instrumentality of commerce but was formerly an army installation known as Camp Losey (Record Appendix, p. 12).

When eventually in operation the Fort would be used by the Government, only, for communications relating to the national defense, alone. The Government would not be "in competition" with private industry, the only exceptions being communications with the aircraft bearing the President of the United States, should he come to the area, and communications of emergency distress signals (Record Appendix, p. 16).

The District Court, holding that plaintiff had failed to establish coverage under the Act, dismissed the complaint. 14 W. H. Cases, 720-721; 41 Labor Cases, ¶31,011.

Said the District Court:

"FINDINGS OF FACT

"7. Defendant has been paying and is paying its employees engaged in the construction of the facilities required by the aforesaid contracts, wages in accordance with Mandatory Decree 44 issued by the Minimum Wage Board of the Commonwealth of Puerto Rico.

"8. Defendant has been paying and is paying its unskilled workers engaged in or directly connected with the facilities aforementioned wages at less than the minimum wages prescribed under the Fair Labor

Standards Act by the Wage Order for the Construction, Business Service, Motion Picture and Miscellaneous Industries in Puerto Rico (29 C.F.R., Chapter 5, Part 672).

"9. Contract No. 1 provided for the construction of various buildings, including a transmitter building, a communications center building, a receiver building and three power plants. Upon completion of these buildings pursuant to the terms and provisions of Contract No. 1, said buildings could not be used for reception or transmission of radio messages without the performance of additional work and the furnishing of additional equipment by parties other than the defendant.

"10. Contract No. 2 provided for the construction of support facilities, thirty buildings in all, including barracks, mess halls and recreational facilities. Upon completion of these buildings pursuant to the terms and provisions of said contract such facilities could not be used for the reception or transmission of radio messages without the performance of additional work and the furnishing of additional equipment by parties other than the defendant.

"11. Upon completion of both contracts by the defendant and the further completion by other parties of work necessary to enable the using agency to receive and transmit radio messages, such facilities would carry messages solely to and from governmental agencies and would not receive or transmit commercial messages except in emergencies" (R. A. at 33-34).

"[Emergencies in time of distress do not establish a custom]" (R. A. at 17).

"Conclusions of Law

"1. This court has jurisdiction * * *

"2. Plaintiff has failed to establish that the defendant is engaged in commerce or the production of goods for commerce in the performance of its work [here involved]" (R. A. at 34).

In the companion case (opinion set forth in full at appendix), the Court stated (*Mitchell* v. *Nolla, Galib & Compania*, 184 F. Supp. 919 at 921):

> "The court believes that Congress intended that the Fair Labor Standards Act apply only in *presente* and not in *futuro*. In other words, that in order that any work can be considered within the coverage of the act the facilities on which such work is being performed must be actually used in commerce at the time said work is being performed, or actually intended to be used, in commerce, thereafter. But if such facilities are not being actually used in commerce, or they are not actually intended to be so used, thereafter, the work shall not be considered as falling within the coverage of the act, even if the possibility of their limited use in commerce, at some future date, either because of an emergency or any unforeseeable event, could be surmised or conjectured. * * *
>
> And Powell v. United States Cartridge Co., supra [339 U. S. 497], only dealt with the "production of goods for commerce" feature of the Fair Labor Standards Act, 29 U. S. C. A. §201 et seq., and not with the "engaged in commerce" feature of the act with which this action exclusively deals."

The complaint in *Nolla Galib* was likewise dismissed.

The Court of Appeals, hearing the Government's appeals together, reversed both judgments of dismissal, suggesting that the District Court was "too much impressed with cases like *Divins* v. *Hazeltine Electronics Corp.*, 163 F. 2d 100 (2d Cir. 1947), in which the court, construing the phrase 'engaged in commerce,' introduced a distinction between instrumentalities held by the government exclusively for war purposes and those in commercial use, so as to hold the Act inapplicable to employees engaged in repairing and servicing radio and radar equipment on United States war vessels."

Concluded the Court of Appeals:

> "It seems to us that this distinction was in effect disapproved in *Powell* v. *United States Cartridge Co.*, 339 U. S. 497 (1950)" (Record, p. 38).

Both matters were remanded for further proceedings.

(f) * * *

(g) The Basis for Federal Jurisdiction in the Court of First Instance

The action was brought under 29 U. S. C. §217 to enjoin defendant (Petitioner here) from violating the provisions of Sections 206, 207, and 215(a)(2) of the Fair Labor Standards Act.

(h) Argument

We do not believe the holding of this Court in *Powell* v. *U. S. Cartridge Co.*, 339 U. S. 497 (1950) to be controlling here. We believe that the construction of a communications relay center for the exclusive use of the national defense of the United States, which will never pass through the channels of commerce, and which will never be used for commercial communication or passage of goods,

should not be treated as an engagement in commerce for the purposes of the Fair Labor Standards Act.

We believe that the defense program recently initiated in view of the tense international situation makes this a serious and important question of federal law which has not been but should be settled by this Court.

We believe that the varying views expressed on this subject by the First Circuit, in the opinion below, on the one hand; and the Sixth Circuit in *Cooper* v. *Rust Engineering Co.*, 181 F. (2d) 107, ptn. rhg. den., 187 F. (2d) 732, the Eighth Circuit in the *Spencer* v. *Porter*, 183 F. (2d) 745, and more recently in the District Court in the Ninth Circuit, in *Mitchell* v. *J. G. Watts Construction Co.*, D. C. D. Ore., June 5, 1961, per East, *J.*, 15 W. H. 112, —— F. Supp. ——, all decided since *Powell* v. *U. S. Cartridge Co.*, 339 U. S. 497, suggest clarification of the subject by this Court.

We believe that the state of uncertainty which the Court in *Watts* found to exist, to wit:

> "Applicability of the FLSA to employees engaged in construction generally (and construction of facilities of war or national defense in particular) has been a fertile area of litigation. Any attempt completely to harmonize the many decisions concerning coverage by the Act is virtually certain to end in less than total success,"

should be put to rest by this Court.

POINT I

Increasing international tension necessitates constant vigil against hostile moves by unfriendly neighbors in a shrinking world. Whether construction of a communications relay center the better to maintain that vigil is within the scope or intent of the Fair Labor Standards Act, and whether the all-out effort upon which our national security depends should be constrained within the limits of a peacetime measure designed to improve working conditions in private industry, are questions which should be decided by this Court.

A. Covered by the Act under consideration are commerce and the production of goods for commerce. Not covered is the construction of instrumentalities of war.

The difference between commerce and war is the difference between normal activity and total upheaval. It is a difference of which the Courts will take judicial notice (*United States* v. *Hamburg-American Co.*, 239 U. S. 466 at 475 [1916]), and which has been and which has been recognized by statutes from time immemorial. DEUT. 20; compare U. S. C. Title 15 with Title 50; U. S. CONST., Art. 1, §8. Obviously if war were to be taken as inherent in commerce, the power to declare war would not have had to be separately stated by the framers from the power to regulate commerce, under which this Act was promulgated.

The Court below, planting itself upon the decision in *Powell* v. *U. S. Cartrige Co.*, 339 U. S. 497, appears to have taken the position that the case brought to nought this fundamental and Constitutional distinction. This Court there held that employees in a munitions plant operated by private industry in a cost-plus contract *where the munitions were to be shipped in interstate commerce* and their ultimate consumer was the United States, *and where the*

Company distributed a booklet which provided that overtime will be paid as provided under the Walsh-Healy Act and the Fair Labor Standards Act are within the coverage of the Fair Labor Standards Act.

We do not believe Powell should be controlling here, where neither the employer's nor the employees' activities are in any way connected with interstate commerce and where the employees are in fact covered by local wage and hour provisions, as has been indicated. We believe it to be a fair interpretation of Powell that it should apply (1) to actual manufacture of munitions which are to be shipped in and as part of the stream of interstate commerce, or (2) to instances where there is a representation upon which the employees have a right to rely, that they will be covered by the Act.

A long line of cases in the Courts of Appeals, both pre-Powell and post-Powell, supports this distinction between construction of war facilities and facilities of commerce. See, e.g., pre-Powell, *Divins* v. *Hazeltine Electronics Corp.*, 165 F. (2) 100 (2 Cir. 1947) [war vessels are instrumentalities of war and not of commerce, and work on war vessels is accordingly not covered, while work on armed transports, which are primarily instrumentalities of commerce, is covered]; *Laudadio* v. *White Const. Co.*, 163 F. (2d) 383 (2 Cir. 1947) [reconstruction of Floyd Bennett Field; held, if the field were used solely to train air personnel, would be an instrumentality of war and not covered; but since it appears to have other uses, in commerce, held, covered]; *Nieves* v. *Standard Dredging Corp.*, 152 F. (2d) 719 (1 Cir. 1945), *Selby* v. *J. A. Jones Const. Co.*, 175 F. (2d) 143 (6 Cir. 1949) [employees engaged in construction of Oak Ridge Atomic Bomb site are not covered; excerpts from opinion below]; *Young* v. *Kellex Corp.*, 82 F. Supp. 953 (U. S. D. E. D. Tenn. 1948) [employee, transportation

manager at Oak Ridge, not covered]; *Cooper* v. *Rust Engineering Co.*, 181 F. (2d) 107 (6 Cir., 1950); ptn. rhg. den. 187 F. (2d) 732 (6 Cir., 1950) [construction of an ordnance plant is not covered].

Between the two decisions in 6th Circuit this Court decided *Powell.* The first *Cooper* decision was handed down April 21, 1950. Seventeen days later, on May 8, 1950, this Court decided *Powell.*

On June 17, 1950, the Sixth Circuit denied a petition for rehearing and on November 6, 1950, six months after *Powell,* this Court denied *certiorari,* 340 U. S. 879.

The two decisions in *Spencer* v. *Porter,* 8 Cir., 174 F. (2d) 731 (pre-*Powell*) and 183 F. (2d) 445 (post-*Powell*) are likewise illustrative of the fact that construction of what is partly an instrumentality of war is still not covered. It had there earlier been held that construction of an arsenal is not within the coverage of the Act [174 F. (2d) 731, April 19, 1949]. After *Powell,* the Court of Appeals for the Eighth Circuit stated:

> "This Court held * * * that insofar as appellants' claims were based on services rendered by them in connection with the *construction* of the Pine Bluff Arsenal in Arkansas, the appellants were not within the coverage of the Act. We adhere to that ruling." [As to employees engaged *in actual manufacture of munitions, the case was sent back for trial.*] (Italics supplied.)

The line of cases holding that construction of a facility of war is without the operation of the Act continues unbroken, since *Powell,* as it did before. See, e.g., *Fruco Const.* v. *McClelland,* 192 F. (2d) 241 (8 Cir. 1951) [construction guards at ordnance plant not subject to Act];

Patton v. *Roane-Anderson Co.*, 192 F. (2d) 965 (6 Cir. 1951) [further contract at Oak Ridge atomic bomb site held not covered]; *Hartmaier* v. *Long*, 361 Mo. 1151 (238 S. W. (2d) 332), 1951, cert. den. 342 U. S. 833 (1951) [employees engaged in construction of war aircraft plant for *Pratt & Whitney*, not covered]; *H. B. Deal & Co.* v. *Head*, 221 Ark. 47, 251 S. W. (2d) 1017 (1952) [employees engaged in construction of ordnance plant not covered]; *Mitchell* v. *J. G. Watts Construction Co.*, D. C. Ore., June, 1961, 15 W. H. 112, —— F. Supp. —— [employees engaged in construction of housing for radar facility not covered; opinion set forth at appendix, pp. 15a *et seq.*].

The facts in the *Selby* case run parallel to the facts here; and the reasoning of the Court in that case is peculiarly appropriate:

> "In December 1941 the nation went to war. Its very existence was imperiled—the struggle was merciless. The manpower and resources of the nation were placed at its disposal. Men thought, worked, planned and hoped for victory. Scientists declared that an atomic weapon could be made; the Government set about to make it and in the course of time such a bomb was produced at a cost of more than two billion dollars. Its production was the greatest scientific achievement in the history of warfare. It was a deadly instrumentality of war and Hiroshima and Nagasaki attested its effectiveness. It quickly brought the conflict to a close.
>
> "The material facts, as stipulated, disclosed that: As a part of this effort, the Government in September 1942 began to develop the Clinton Engineering Works, commonly called Oak Ridge, which was a unit of the Manhattan District established under the War Powers Act and Executive Orders of the President to carry on research and develop an atomic bomb. The Manhattan District was under the direction of the United States

Army Corps of Engineers; and the bomb was the objective.

"This was a gigantic undertaking. The Oak Ridge project consisted of a site of more than seventy square miles, acquired by the United States and located along the Clinch River in Tennessee, upon which arose a great array of new plants, new residental districts and a new city, all of which were hurriedly erected and developed directly or indirectly to the development of the bomb.

"From June 1944 to January 11, 1946, appellee, a corporation operating under a contract with the United States dated May 18, 1943, was engaged in the construction, remodelling and modification of certain structures that were a part of the Clinton Engineering Works. During varying periods between the dates above mentioned, those of the appellants who were employees of appellee normaly worked in excess of forty hours and were not compensated in accordance with a provision of Sec. 7 of the Fair Labor Standards Act.

"Between June 1944 and March 1, 1945, certain buildings constructed by appellee under its contract were completed and turned over to the operating company, which was under contract with the United States to process materials to be used as component parts of the bomb. None of the buildings completed during this period were constructed for use directly in processing purposes but were constructed for cafeterias, dispensaries, etc." [such as the buildings involved in Increment No. 2 in the case at bar]. 175 F. (2d) at 144.

Concluded the Court:

"In Gibbons v. Ogden, 9 Wheat. [22 U. S.] 1, 83, Chief Justice MARSHALL said:

"'Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. * * *,'"

"In Brown v. State of Maryland, 12 Wheat. [25 U. S.] 419, 446, the same Chief Justice said:

"'Commerce is intercourse,—one of its most ordinary ingredients is traffic,—*Sale is the object of transportation* and is an essential ingredient of that intercourse of which importation constitutes a part.'

"In Carter v. Carter Coal Co., 298 U. S. 238, 298, the court said:

"'As used in the Constitution, the word "commerce" is the equivalent of the phrase "intercourse for the purposes of trade," and includes *transportation, purchase, sale and exchange of commodities* between the citizens of the different states. * * * In Adair v. United States, 208 U. S. 161, 177, the phrase, "Commerce among the several states" was defined as comprehending "traffic, intercourse, trade, navigation, communication, the transit of persons, and the transmission of messages by telegraph,—indeed, every species of commercial intercourse among the several states"'" 175 F. (2d) at 146 [Italics Supplied].

Finally, the Court stated, in language that still cannot be overemphasized:

"The bomb is a prodigious weapon and as a matter of policy the Government has wisely retained it for its own protection in time of war. Its components are highly dangerous elements, not to be released to com-

merce even in time of peace, until men have learned to control their use."

As though it were addressing itself to this Court in the case at bar, where the subject of discussion is protection against missiles flying at the rate of 2,000 m.p.h., the Court there stated:

> "We are dealing with an intensely practical question, as well as an important one, and we cannot think that the bomb was an article of commerce or that the processing of materials used in its development was the equivalent of production of goods for commerce.
>
> "The term 'Goods' is defined in Section 203(i) of the Act, but this definition does not include all goods of every kind and character. It embraces only such articles as are produced for commerce. *The bomb and its component parts were developed for war and not for commerce. The fact, commonly known and judicially recognized, that it was produced secretly and in haste, negatives the idea of commercial intercourse. The use of the bomb as a weapon of war is the antithesis of the regulation of 'Commerce with Foreign Nations.' Such use is not intended to regulate but to destroy commerce*" (at 146-147).

In the *Cooper* case, *supra* (certiorari denied post-*Powell*), it appeared that:

> "More than 12,000 acres were needed for the construction of the [ordance] plant and at one time the employees of the appellee company numbered approximately 8,000 persons who were engaged in various capacities, such as clerks who received and checked material and supplies; clerical, stenographic and office workers; nurses; telephone operators; and a few rec-

> ord clerks for the maintenance of engineering and architectural records.
>
> The appellee was engaged exclusively in the construction of the plant, and had nothing to do with the handling of the products of the plant. The work of its employees was limited to local intra-state building activities. The manufactured product of the plant when in operation was shipped from Kentucky to other States and to foreign countries. * * *
>
> Employees of local construction contractors generally are not engaged in interstate commerce or in the production of goods for commerce * * *"

added the Court (181 F. (2d) at 108); and this Court denied certiorari after *Powell.*

* * * * *

Mitchell v. *J. G. Watts Construction Co.*, 15 W. H. 112, —— F. Supp. ——, presents perhaps the latest thinking on the subject in another Circuit. For the convenience of the Court, since the opinion is not yet reported in the Federal Supplement, we have set forth a copy at the appendix, at pp. 15a *et seq.*

The case, involving construction of a radar facility, is almost identical with the case at bar—the exceptions being that there the radar facility was intended to be used at times for commercial purposes—here no commercial use, ever, is intended. With this exception the facts in *Watts* parallel the facts here.

There as here the action sought an injunction.

There as here there was more than one contract awarded to the defendant; there was the radar facility; there was the transmitter facility; and there was a water supply facility.

There as here, in an otherwise abandoned area, there was construction of (1) a radar tower, an operations building, a power building, a transmitter building; and (2) a barracks, a mess hall, an administration building, a water tower.

There as here, defendant had nothing to do with the installation of the radar and other electronic and power equipment or the operation of the completed facilities.

There as here after the installation of equipment, not by defendant, the facility "transmits radar waves to and receives information and intelligence from points outside the State of Montana."

There,—but not here,—the information and intelligence was used not only by the military but by civilian aircraft as well.

Said the Court, per EAST, *J.*:

> "'Commerce' is defined to mean trade, commerce, transportation, transmissions or communications among the several States or between any State and any place outside thereof.
>
> "Applicability of the FLSA to employees engaged in construction generally (and construction of facilities of war or national defense in particular) has been a fertile area of litigation. Any attempt completely to harmonize the many decisions concerning coverage by the Act is virtually certain to end in less than total success."
>
> "Without expressly deciding the question whether national defense operations are 'commerce,' it is the Court's decision that the employees involved herein were not engaged in commerce."

* * * * *

If the conflict between the views of the Oregon District Court in *Watts;* the 8th Circuit in *Spencer* v. *Porter, supra,* 174 F. (2d) 731; the Sixth Circuit in *Cooper* v. *Rust Engineering Co.,* 187 F. (2d) 732, on the one hand; and the First Circuit, in its decision below, on the other, is to be resolved, this Court should grant certiorari.

B. An instrumentality of war may be, but is not necessarily, an instrumentality of commerce.

That an instrumentality of war may also be an instrumentality of commerce, as indicated in *Mitchell* v. *Lublin, McGaughy & Asso.,* 358 U. S. 207 (1959), admits of no doubt. But it scarcely follows logically that instrumentalities of war are necessarily instrumentalities of commerce.

Indeed, in the very opinion in *Mitchell* v. *Lublin,* relied on by the Court below, it was indicated that from 15% to 40% of the work done by respondent was *commercial* work *in interstate commerce*, including the construction of local sewerage in Maryland, television facilities, shopping centers and bus terminals, and so the employees were held to be covered. And as this Court indicated, at page 213:

> "a facility designed for war *may also be* an instrumentality of commerce." Italics supplied.

But when the facility has no commercial purpose and is connected with no commercial enterprise, we *quaere* whether it is fairly within the intent of the Statute.

C. The construction here involved being

(1) *incomplete and not functioning even when concluded;*

(2) *consisting of two increments only, i.e.,*

(a) a communications relay center which originated no messages but served only as relay; and

(b) housing, etc., for troops.

it is, we believe, so far unrelated to any facility of commerce as to negate the operation of the Fair Labor Standards Act within the meaning of *Mitchell* v. *Zachry* and *Mitchell* v. *Vollmer*.

(1) In the case at bar neither maintenance nor repair is involved, but only construction. This construction, even when petitioner's two contracts will have been performed, will remain incomplete and not ready for use by the Government. It was testified that "even if the first and second contracts were performed," the center would still "not be capable of receiving and transmitting messages". Additional increments were in contemplation (R. A. pp. 19-20). The very operation of the completed installation will be neither in commerce nor a facility of commerce; *a fortiori*, the construction of the installation should not be deemed to be in commerce.

As the Court in *Watts* concluded, "the employees here were, at most, engaged in the construction of a new facility which subsequently would be connected with other such facilities for the purpose of performing communications services for existing instrumentalities of national defense. * * * The work performed [is] too remote from any possible 'commerce' to be considered a part of it. The construction work was *not* 'so directly and vitally related to the functioning of an instrumentality or facility of inter-

state commerce as to be * * * a part of it." 15 W. H. 112, —— F. Supp. —— (1961).

(2) The very subject of the construction is far afield from commerce. The first increment, the subject of Petitioner's first contract, is the relay center, a group of buildings to house technical facilities, i.e., receiver, transmitter and communications center, for relaying, only, of defense messages originating elsewhere. The second increment consists of support facilities such as barracks and mess halls for Army personnel which are far removed from the stream of commerce.

In the final analysis, one may search in vain for any relationship between the completed construction and the stream of commerce. Operation of the facilities—to be completed after Petitioner's work is done—will only support the defense effort and not be involved in commerce; and construction of the buildings is a step yet more remote.

We believe this Court should entertain certiorari so that there may be a determination as to whether, within the ruling of this Court in *Zachry*, employees are covered.

Whether the construction be new or the extension of an existing facility of war, we submit it is still not covered because in neither event is it commerce or the production of goods for commerce. The *Vollmer* case, *Mitchell* v. *C. W. Vollmer & Co., Inc.*, 349 U. S. 427 (1955) does not transform what is essentially an activity of war or national defense into an activity of commerce.

Vollmer, to be sure, destroyed the distinction between old construction and new. As the Court below correctly pointed out, *Vollmer* "expressly rejected" the "new construction" doctrine of the Federal Employers' Liability Act as inapplicable to cases under the Fair Labor Standards Act.

But *Vollmer* did not hold, *ipso facto*, that all construction is covered under the Act. Construction to be covered, must, under the very last word of this Court, be sufficiently "closely related" to production of goods for commerce to be within the coverage of the Act. *Mitchell* v. *H. B. Zachry Co.*, 362 U. S. 310 (April, 1960), at 319, 320.

Thus in the *Zachry* case this Court, holding that construction workers engaged in the building of a dam which was eventually to be used to supply water to producers who in turn would produce goods in interstate commerce, it appearing that a substantial flow of water was necessary to their production, were nevertheless not covered, stated:

> "The distinction between maintenance and repair on the one hand and replacement or new construction on the other may often be difficult to delineate but is [as suggested in Vollmer] a practical distinction to which the law must not be indifferent. Its relevance here, when our purpose must be to isolate primarily local activities from the flow of commerce to which they invariably relate, lies in the close relation of maintenance and repair to operation as opposed to replacement or new construction, which is a separate undertaking necessarily prior to operation and therefore more remote from the end result of the process. As we held in Vollmer, that an activity is rightly called construction and is therefore distinct from operation, does not *per se* remove it from coverage. Construction may be sufficiently 'closely related' to production to place it in that proximity to 'commerce' which the Act demands as a predicate to coverage. Here, however, neither a facility of 'commerce' nor a facility of 'production' is under construction. Operation of the completed dam will merely support production facilities; and construction of the dam is yet another step more remote" (362 U. S. at 319).

We find little in principle to distinguish this case from *Zachry*. In *Zachry*, as here, the subject was construction; in *Zachry*, as here, the project, even when completed, was not to be used without additional facilities. In *Zachry* there was at least a showing that operation of the dam under construction would support production facilities. Here, even such a showing is absent. Operation of the center would support only the defense of the United States and the free world.

Concluded Justice *Frankfurter* in language peculiarly appropriate here:

> "The combination of the remoteness of this construction from production, and the absence of a dedication of the completed facilities either exclusively or primarily to production, persuades us that the activity is not 'closely related' or 'directly essential' to production for commerce."

A judgment against the Government was affirmed.

If there is to be a departure from the language as well as the reasoning of the *Zachry* case, we believe such a departure should be announced by this Court.

POINT II

The decision below appears to run counter to applicable territorial law.

A. The all-inclusive language of the Puerto Rican Minimum Wage Law (Laws of Puerto Rico, Anno., Tit. 29, §§245 et seq., Laws of Puerto Rico, 1956, Act No. 96, approved June 20, 1956) and Mandatory Decree No. 44 issue thereunder,

(1.) lend support to the view that Petitioner's employees are covered by it and

(2.) efface any hardship they might have suffered were they not covered at all.

The Puerto Rican Minimum Wage Law has been in existence since April 1941. (Laws of Puerto Rico, 1941, No. 8; *infra*, pp. 38a *et seq.*)

Under that law, broad and comprehensive decrees have been established by the Minimum Wage Board covering employees in every conceivable occupation. The thought, therefore, that employees may be left uncovered at all if not covered by the Federal Law may at once be dismissed.

Moreover, the very existence of a decree applicable to the Puerto Rican construction industry* which includes "*without limitation* every act, process, operation, work or service necessary or incidental, or related to the designing, project, fabrication, reconstruction, alteration, repair, conservation or maintenance of buildings, works or constructions"—the very use of the broadest coverage, in the Puerto Rican decree, as contrasted with the rather limited area covered by the Federal Regulations (see B, *infra*, p. 28)

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* Excerpts from Mandatory Decree No. 44 issued by the Minimum Wage Board of Puerto Rico are set forth at pages 41a-42a, *infra*.

indicates that it is the Puerto Rican Mandatory Decree which should be controlling here.

We are aware of the specific exclusion in the Puerto Rican Mandatory Decree of "any industry, business or service covered by * * * any wage order issued under the Fair Labor Standards Act". This means of course that where the operation of the Federal law has preempted the field, the Mandatory Decree shall not—nor could it—supersede.

But viewing the Federal Regulations and the Puerto Rican Decrees at their confluence and from the same perspective we believe that the Federal Act fails of operation here, leaving coverage mandatory under the Puerto Rican Decree.

Obviously, such a holding here would not leave the employees of this Petitioner remediless. They were being paid at the time of trial at the standard minimum wage rate payable to all other construction workers in Puerto Rico, to which the only exceptions were those engaged in interstate commerce. It is the announced purpose of the Puerto Rican Act, "as rapidly as possible to eliminate substandard working conditions in industries, promote living, health and safety standards for workers, * * * and achieve the highest possible wage level compatible with such development, without substantially curtailing employment or impairing the opportunities to obtain the highest wages" and to that end that "the minimum wages in each business industry or occupation be revised at least once every two years until attaining as rapidly as is economically possible, a minimum wage of $1.00 per hour." Laws of Puerto Rico, Anno., T. 29 §245(b)-(c) (Suppl.); Laws of Puerto Rico, 1956, Act No. 96 (June 20, 1956), Section 1(b)-(c). [See Appendix.]

These employees, therefore, would remain amply protected if the Federal law were held to be inapplicable.

B. On the contrary the very language of the regulations under the Fair Labor Standards Act concerning the Puerto Rican communications and construction industries (29 C. F. R. §§671-672 as amended) indicates the exclusion of construction for defense purposes.

In vain may we search the detailed Regulations applicable to Puerto Rican communication and construction industries (set forth *infra* at pp. 32a *et seq.* of Appendix to this Petition) for the slightest indication that war communication or defense construction is covered.

Covered communications include:

> "The *industry* carried on by any wire or radio system of communication, or by messenger service; • • • and by any concern engaged in transportation *for compensation* by air, water, rail, motor vehicle, pipeline, or other means • • • " (Emphasis supplied.) Part 671, §671.1.

By its very terms, defense communication is excluded; it is neither an industry in the well-defined limits of that term, nor is it communication or transportation *for compensation.* Interestingly enough, the words "for compensation" were only recently added—the earlier revisions (see pp. 28a *et seq., infra*) not having included that description.

Nor does the construction of such facilities fall within the Special Industry Committee's definition.

Covered construction, we find, includes "buildings such as":

1. "industrial";
2. "commercial";
3. "institutional";

4. "public";
5. "electric power plants";
6. "natural gas compressing stations";
7. "oil pumping stations";
8. "furnaces";
9. "kilns";
10. "similar appurtenances of industrial plants."

(All the foregoing §672.2 of the Regulations, 29 C. F. R., pocket supplement.)

Within none of these listed categories does this construction work fall. Conceivably it might be within the definition of "public" since it is publicly owned, i.e., by the Sovereign; nevertheless, we are sure the public would not be permitted to roam about and browse in these buildings as it might, for example, in a school, courthouse, museum, or library, which are considered as the standard types of public buildings.

With such a long list, and with Puerto Rico an outpost of the United States, the special industry committee (29 U. S. C. §205), specially familiar with the Puerto Rican situation, nevertheless omitted as late as September, 1960, military construction. We believe the reason to be obvious—as obvious as its express requirement that the communication and transportation be for hire (§671.1).

But even if the specific requirement of hire were not mentioned, the principle *inclusio unius est exclusio alterius* would in any event delete from the operation of the statute work done solely and exclusively on behalf of the maximal military preparedness of these United States.

These then are supplemental but important questions of Federal law which have not, but should be, settled by this Court.

POINT III

Tested by the rule of *McLeod* v. *Threlkeld*, 319 U. S. 491 (1943), i.e., that it is the activity of the employee and not of the employer that is determinative of coverage, employees constructing the facilities of war here involved are not covered.

The square holding of the *McLeod* case, which has been reaffirmed in the many cases since, that it is the activity of the *employee* rather than the *employer* which is controlling, points to the result here.

In *McLeod* it appeared that employees of a local commissary which was under contract to furnish meals to maintenance men of an interstate railroad, were not covered, this Court stating:

> "It is not important whether the employer, in this case the contractor, is engaged in interstate commerce. It is the work of the employee which is decisive" (at 497).

Applying this test to the case at bar, we believe it follows that one employed in the construction of a purely military facility, whether he be bricklayer, clerk, plumber, electrician or as in the case at bar an unskilled laborer (see Stipulation, Par. VI, Record Appendix, p. 8), should not be covered by the Act. Any departure from the rule of *McLeod* v. *Threlkeld* should be announced by this Court.

CONCLUSION

Long centuries ago, in ancient Israel, fire signals from mountain to mountain for the purpose of heralding the sighting of the new moon and establishing the first day of the month, had to be discontinued because of interference by Cutheans [Samaritans] who lit false signals (Talmud, Tr. Rosh Hashonah, 22b.). Foot and cavalry messengers had to be substituted, and were continued until mathematical computation of the new moon was substituted for visual observation by eyewitnesses.

Modern America, faced with annihilation by supersonic missiles, finds that radio signals at the temperate latitudes must be discontinued because of interference by sun spots (Record Appendix, pp. 13-14). Equatorial transmission is necessary.

Not in astronomical calculations as between the moon and the sun lies the difference; nor indeed in the 2000 intervening years; but in purpose. In one, the purpose was peaceful: to establish a uniform calendar for all. In the other the purpose is to be on the alert to hostile moves by unfriendly neighbors in a shrinking world.

In the final analysis, if employment in such a project is held to be covered, then all subsequent contractors will be justified in raising their bids on war and defense contracts.

As one Court posed the question at the close of World War II (*Stewart* v. *Kaiser & Co.*, 71 F. Supp. 551 [D. C. D. Ore. 1947]):

> "The men and women who worked in the shipyards were doing no more than their proper part in the war. They were well paid and well cared for in every

respect. Their services could have been demaded on lesser terms. There must come an end to gouging the Government. Nothing that I heard at the Pre-Trial makes me believe that the Government, the ultimate paymaster, is under obligation to pay guards and other shipyard employees a second time, and in addition, attorneys' fees. In short the employment was provided by the Government; it was directed and contracted by the Government; and the Wages and Hours Act, which was enacted as a peacetime measure to improve working conditions in private industry has no application in the respect here claimed."

To resolve the conflict between the Circuits on these important questions of Federal law, the seriousness of which increases with the mounting international tension *certiorari*

is, we believe, indicated, and the petition for a writ of

Dated: New York, New York
August 29, 1961

Respectfully submitted,

JOSEPH N. FRIEDMAN
Counsel for Petitioner

ANTHONY J. SIMINERIO
Of Counsel

APPENDIX

Opinion in United States Court of Appeals for the First Circuit

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 5741.

ARTHUR J. GOLDBERG, Secretary of Labor,
United States Department of Labor,

Plaintiff-Appellant,

—v.—

NOLLA, GALIB & CIA.,

Defendant-Appellee.

No. 5747.

ARTHUR J. GOLDBERG, Secretary of Labor,
United States Department of Labor,

Plaintiff-Appellant,

—v.—

FIVE BORO CONSTRUCTION CORPORATION,

Defendant-Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Opinion in United States Court of Appeals

Before:

MAGRUDER,* HARTIGAN and ALDRICH,
Circuit Judges.

Beate Bloch, Attorney, with whom *Harold C. Nystrom*, Acting Solicitor of Labor, *Bessie Margolin*, Assistant Solicitor, and *Kenneth P. Montgomery*, Regional Attorney, were on briefs, for appellant in each case.

Jorge Souss, with whom *Blanco Lugo & Souss* was on brief, for appellee in Case No. 5741.

Anthony J. Siminerio, with whom *Joseph N. Friedman* was on brief, for appellee in Case No. 5747.

OPINION OF THE COURT.

June 15, 1961.

MAGRUDER, *Circuit Judge*. These two cases, which involve esentially the same point, were argued together on appeal and may be disposed of by a single opinion. In each, a complaint was filed by the Secretary of Labor requesting that the defendant be enjoined from violating the minimum wage and overtime provisions of the Fair Labor Standards Act of 1938. 29 U.S.C. § 201 *et seq.* The United States District Court for the District of Puerto Rico entered judgments dismissing the two complaints, on the ground that the defendants were not engaged in commerce or the production of goods for commerce within the meaning of the Act. Appeals from these two judgments were taken by the Secretary of Labor.

We think that the district court was too much impressed with cases like *Divins* v. *Hazeltine Electronics Corp.*, 163

* Sitting by designation.

F.2d 100 (2d Cir. 1947), in which the court, construing the phrase "engaged in commerce," introduced a distinction between instrumentalities held by the government exclusively for war purposes and those in commercial use, so as to hold the Act inapplicable to employees engaged in repairing and servicing radio and radar equipment on United States war vessels. It seems to us that this distinction was in effect disapproved in *Powell* v. *United States Cartridge Co.*, 339 U.S. 497 (1950).

Admittedly the Congress cannot by definition enlarge the meaning of the "commerce" clause of the Constitution, which remains the statutory basis of the Fair Labor Standards Act. It is true that "commerce" is defined in the Act as meaning "trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof." 29 U.S.C. § 203(b). The employees in the *Powell* case were engaged in the manufacture of munitions, which were destined to be shipped abroad and consumed by the United States, not sold in any commercial transaction. This was held to be "transportation," and thus "commerce," despite the lack of a commercial element. We cannot see that it makes any difference that the *Powell* case considered the phrase "the production of goods for commerce" in the statute rather than "engaged in commerce." In effect that case overruled *Divins* v. *Hazeltine Electronics Corp.*, supra, 163 F.2d 100.

In our Circuit, *Nieves* v. *Standard Dredging Corp.*, 152 F.2d 719, 720 (1st Cir. 1945), had to do with employees engaged in constructing a graving dock as part of Roosevelt Roads Naval Base in Puerto Rico. If the distinction had been sound between war and commercial purposes, we would have had an easy way to deny coverage in that case; instead we held that the employees were not engaged "in commerce" because they were not doing work "so

closely related to the movement of the commerce as to be a part of it," as was stated in *McLeod* v. *Threlkeld*, 319 U.S. 491, 497 (1943).

We agree with the decision of the Fifth Circuit in *Mitchell* v. *Empire Gas Engineering Co.*, 256 F.2d 871, 784-85 (1958), that if the employees' activities otherwise involve them in interstate commerce, the Fair Labor Standards Act applies to them even though the action is carried on by the government.

In No. 5741, the employees concerned were building hangar facilities, a fire pumping station, and a water storage tank at an existing United States Naval Air Station. In No. 5747, the employees were constructing a transmitter building, a communications center building, a receiver building, three power plants, all support buildings and utilities which, when finished, were to take their place as a communications relay center of the Army Communications Administrative Network. We do not think it is material, but the stipulated facts state that the facilities in both cases related solely to the government's war effort and so far as appears were never to be used for commercial purposes.

In No. 5741, it is stipulated in part that: "1. The hangar facilities are essential to the functioning of the aviation facilities of the base. 2. Military air transports occasionally bring in to Puerto Rico from the mainland, marine support personnel to Vieques for maneuvers. Since there are no adequate aircraft facilities on Vieques, the planes stop at Roosevelt Roads for refueling and crew rest prior to returning to the U.S." The recitations in the stipulation do not contain so much detail as might be desired, but we cannot believe that the operation of the air base did not include fairly extensive shuttling of planes back and forth between the mainland and Puerto Rico.

The stipulation and the testimony of one witness in No. 5747 give a complete presentation of the operations of the communications center which, when completed, will engage in world-wide reception and transmission of messages. The employees were engaged in constructing the buildings, not in installing the radio equipment. No doubt, the radio relay station which they were building was admittedly "new construction"; but the distinction between new construction and repairs has been expressly rejected by the Supreme Court as a determinative touchstone whereby to decide the coverage of the Act. See *Mitchell* v. *C. W. Vollmer & Co., Inc.*, 349 U.S. 427 (1955), and *Mitchell* v. *H. B. Zachry Co.*, 362 U.S. 310, 313 (1960). Within the meaning of *McLeod* v. *Threlkeld*, supra, 319 U.S. 491, 497, it seems to us that the labor of those employed in construction of the facilities at the communications relay station was certainly as closely related to commerce, if not more so, than that of the designers and draftsmen in *Mitchell* v. *Lublin, McGaughy & Associates*, 358 U.S. 207 (1959).

There were two contracts being performed by the defendant in No. 5747. But there is no real distinction between the activities of the employees under contract No. 1, calling for the construction of the technical buildings and the power plant, and contract No. 2, calling for the erection of support buildings and utilities. According to the testimony below, all these facilities were an "integral part" of the whole project. The construction work here should be regarded as an entirety, and not broken down into its component parts. *Archer* v. *Brown & Root, Inc.*, 241 F.2d 663 (5th Cir. 1957). See *Bennett* v. *V. P. Loftis Co.*, 167 F.2d 286, 288 (4th Cir. 1948).

Finally, it has been contended that the injunction should not be issued in No. 5747 because the work called for under

the contracts has been completed. This court is not in a position to determine whether there is any "reasonable expectation that the wrong will be repeated," see *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 633 (1953), quoting from *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 448 (2d Cir. 1945); but the parties will be free to make that contention on remand.

The judgments of the District Court will be vacated and the cases remanded to that Court for further proceedings not inconsistent with this opinion.

On the same day, June 15, 1961, the following judgment was entered:

Judgment

June 15, 1961

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is vacated and the case is remanded to that Court for further proceedings not inconsistent with the opinion passed down this day.

By the Court:

/s/ ROGER A. STINCHFIELD
Clerk

Approved:

/s/ PETER WOODBURY
Ch. J.

Thereafter, on July 14, 1961, mandate was stayed.

Opinion Below in the District Court

RUIZ-NAZARIO, *D.J.*:

FINDINGS OF FACT

1. This is an action instituted by the Secretary of the United States Department of Labor requesting an injunction under the provisions of the Fair Labor Standards Act of 1938, as amended (Title 29 U. S. C. A. Section 201 et seq.) to enjoin the defendant from violating the minimum wage and overtime provisions of the aforesaid act and to enjoin the defendant from advising and inducing other employers, its subcontractors, to violate the minimum and overtime provisions of the act.

2. The defendant is a corporation organized and existing under and by virtue of the laws of the State of New York and is doing business in Puerto Rico, having a branch office at Ft. Allen, Puerto Rico.

3. On or about April 16, 1959 defendant entered into a contract with the U. S. Army Engineers District, Jacksonville, Corps of Engineers, Office of the Area Engineer, for work known as "Construction of Technical Buildings and Power Plant for Communicatio Relay Center" at Camp Losey, Salinas, Puerto Rico, known as Contract No. DA-03-123-ENG-2821, hereinafter referred to as Contract No. 1.

4. On or about June 30, 1959 defendant entered into a contract with the U. S. Army Engineers District, Jacksonville, Corps of Engineers, Office of the Area Engineer, San Juan area, for work known as "Construction of Buildings and Utilities for ACAM Facilities" at Camp Losey, Salinas, Puerto Rico, known as Contract No. DA-08-123-ENG-2910, hereinafter referred to as Contract No. 2.

5. At the time the above mentioned contracts were signed neither one of the aforementioned military posts was in

active use and both were reactivated as of July 1, 1959 pursuant to an order issued by the Department of Defense.

6. Defendant has been employing numerous people in the construction activities necessary for the performance of the above-named contracts.

7. Defendant has been paying and is paying its employees engaged in the construction of the facilities required by the aforesaid contracts, wages in accordance with Mandatory Decree 44 issued by the Minimum Wage Board of the Commonwealth of Puerto Rico.

8. Defendant has been paying and is paying its unskilled workers engaged in or directly connected with the facilities aforementioned wages at less than the minimum wages prescribed under the Fair Labor Standards Act by the Wage Order for the Construction, Business Service, Motion Picture and Miscellaneous Industries in Puerto Rico. (29 C. F. R., Chapter 5, Part 672.)

9. Contract No. 1 provided for the construction of various buildings, including a transmitter building, a communications center building, a receiver building and three power plants. Upon completion of these buildings pursuant to the terms and provisions of Contract No. 1, said buildings could not be used for reception or transmission of radio messages without the performance of additional work and the furnishing of additional equipment by parties other than the defendant.

10. Contract No. 2 provided for the construction of support facilities, thirty buildings in all, including barracks, mess halls and recreational facilities. Upon completion of these buildings pursuant to the terms and provisions of said contract such facilities could not be used for the reception or transmission of radio messages without the

performance of additional work and the furnishing of additional equipment by parties other than the defendant.

11. Upon completion of both contracts by the defendant and the further completion by other parties of work necessary to enable the using agency to receive and transmit radio messages, such facilities would carry messages solely to and from governmental agencies and would not receive or transmit commercial messages except in emergencies.

12. No request for an investigation by the Wage and Hour Investigator was ever made by the defendant and on April 28, 1960 an investigator of the plaintiff advised the defendant in writing that Contract No. 1 was covered by the Fair Labor Standards Act and Contract No. 2 was not covered by the Fair Labor Standards Act.

13. The defendant has neither advised nor induced any of its subscribers to violate the provisions of the act aforementioned.

CONCLUSIONS OF LAW

1. This court has jurisdiction over the subject matter and the parties involved in this litigation. 29 U. S. C. A. Section 217.

2. Plaintiff has failed to establish that the defendant is engaged in commerce or the production of goods for commerce in the performance of its work under Contract No. 1 and Contract No. 2.

3. Plaintiff has failed to establish that Contract No. 1 and Contract No. 2 are covered by the provisions of the Fair Labor Standards Act of 1938, as amended. (29 U. S. C. A. Sections 201 et seq.)

4. The complaint herein should be dismissed as was ordered from the bench when this action was tried on July 7, 1960. Judgment should be entered accordingly.

Judgment Below in the District Court

JUDGMENT

This action was tried by the court on July 7, 1960 at 9:30 A.M. Jose E. Bosch-Roque, Esq. appeared for the plaintiff and Alex Gonzales and Anthony Siminerie, Esqs., appeared for the defendant. The action was submitted on a stipulation of facts signed by the parties and filed with the clerk on July 7, 1960 and oral and documentary evidence adduced by the plaintiff.

After plaintiff rested, defendant moved to dismiss the complaint for failure to state a claim upon which relief can be granted and the Court on the basis of ts holding in *Mitchell* v. *Nolla, Galib & Co.*, Civil 310-59 (of this Court), decided on June 30, 1960, granted defendant's motion from the bench, directing defendant's counsel to submit proposed findings of fact, conclusions of law and form of judgment within a period of 15 days giving notice thereof to counsel for plaintiff, who would have ten days thereafter to submit objections or amendments thereto.

The proposed findings were submitted on July 21, 1960 and the defendant has not offered any amendments or objections thereto.

Now, upon the pleadings, the stipulation of July 7, 1960, the evidence adduced at the trial, the Court's ruling from the bench on July 7, 1960, and the Findings of Fact and Conclusions of Law herein above preceding, it is

ORDERED, ADJUDGED and DECREED that the complaint herein be as it is hereby dismissed and the relief sought thereby by plaintiff against the defendant be as it is hereby denied.

San Juan, Puerto Rico, August 9, 1960.

(s) CLEMENTE RUIZ-NAZARIO
United States District Judge

Opinion in the

trict Court in Companion Case

Mitchell v. *Nolla*,

184 F. Supp. 919. *b & Compania*, D. C. D. P. R. 1960,

Kenneth P. Mont

Bosch Roque, San ery, U. S. Dept. of Labor, Jose E.

Luis Blanco Lugo, P. R., for plaintiff.

n Juan, P. R., for defendant.

RUIZ-NAZARIO, *D.J.*:

Plaintiff has fail

ployees of defenda convince the court that the em-

ect contract NBy-10 orking on the construction proj-

at issue herein, are which is the only project remaining

fore, is entitled to ed in commerce and that he, there-

complaint. njunctive relief prayed for in the

The issue under c

to the court for decieration herein has been submitted

filed by the parties under the terms of the stipulation

the court on the sam vember 25, 1959 and approved by

The facts resultir, and briefs to be filed thereafter.

to support the issue om said stipulation entirely fail

The facilities bei verage.

not appear from sai nstructed under said project do

be used in commere ulation, to be facilities used or to

sively destined to b merely military facilities exclu-

Government of the d in the national defense by the

different branches of l States of America through the

Plaintiff has faile med forces.

facilities have ever to any case holding that any such

merce. considered as being used in com-

The only cases cite

tions were involved plaintiff in which military installa-

Co., 2 Cir., 163 F. 2 *Laudadio* v. *White Construction*

Ritch v. *Puget Sound Bridge &*

Dredging Co., 9 Cir., 156 F. 2d 334; and *Powell* v. *United States Cartridge Co.*, 339 U. S. 497.

But the factual situations involved in these three cases are inapposite to that resulting from the facts stipulated herein.

In *Laudadio* v. *White Construction Co., supra* [163 F. 2d 385], the work was being performed in Floyd Bennett Field which had been a private airfield and an instrumentality of commerce. The Navy took it over for a naval air station. Although the work was being done after the Navy took it over, the court acted on the "assumed premise that Floyd Bennett Field *continued* to be an instrumentality of commerce after the Navy took it over for a naval air station." (Emphasis supplied.) The court further stated "The record is entirely barren of any evidence as to what use was made of the Field during the time the defendants were performing their contract with the Navy. If the Field were used solely to train air personnel of the Navy, it would seem to be an *instrumentality of war rather than an instrumentality of commerce*". Citing *Divins* v. *Hazeltine Electronics Corp.*, 2 Cir., 163 F. 2d 100. (Emphasis supplied.) Then it was added "For purposes of decision we shall assume that to some extent interstate commerce was carried on at the Field after the Navy took it over."

In *Ritch* v. *Puget Sound Bridge & Dredging Co., supra*, the work which was being performed was the dredging of two channels in the harbor of the Bremerton Navy Yard in the navigable waters of Puget Sound, *extensively used for interstate commerce.* Commercial transportation was extensively conducted there not only by private vessels but also by Navy vessels.

And *Powell* v. *United States Cartridge Co., supra* [339 U. S. 497], only dealt with the "production of goods for

commerce" feature of the Fair Labor Standards Act, 29 U. S. C. A. 201 et seq., and not with the "engaged in commerce" feature of the act with which this action exclusively deals.

Plaintiff in his memorandum has asked the court to take judicial notice of certain facts which, in his opinion, will lend support to his contention that the facilities involved herein although being built and expanded for the purposes of national defense eventually or in emergencies they could be used in commerce.

Even if the court took judicial notice of all such facts plaintiff's position would not be better.

The court has to take the facts as they have been stipulated by the parties. It cannot recur to conjecture or speculation to enhance their scope.

The possibility may exist that in an emergency or in now unforeseen situations the facilities here in question could be sometime in the future used to a limited extent for some commercial purpose. But this does not authorize the court to rate those facilities at present and for the purposes of this action as being used or constructed for use in commerce.

The court believes that Congress intended that the Fair Labor Standards Act apply only in *presente* and not in *futuro*. In other words, that in order that any work can be considered within the coverage of the act the facilities on which such work is being performed must be actually used in commerce at the time said work is being performed, or actually intended to be used, in commerce, thereafter. But if such facilities are not being actually used in commerce, or they are not actually intended to be so used, thereafter, the work shall not be considered as falling within the coverage of the act, even if the possibility of their limited use in commerce, at some future date, either because of an

emergency or any unforeseeable event, could be surmised or conjectured.

In *Divins* v. *Hazeltine Electronics Corporation*, 2 Cir., 163 F. 2d 100, 102, the court, with reference to war vessels, stated the following:

> "In any realistic use of words such vessels would seem to be instrumentalities of war, not of commerce. It is true that warships transport men, munitions, food for crew and troops, and occasionally, perhaps, supplies for civilians; and they may at times transmit radio messages for civilians. See Ritch v. Puget Sound Bridge & Dredging Co., 9 Cir., 156 F. 2d 334, 335. This literally satisfies the statutory definition of commerce, but such transportation or communication is merely incidental to the war purpose for which the vessel is actually being used. To hold that workmen who repair aircraft carriers, battleships, submarines or other types of vessels used as weapons of war are 'engaged in commerce,' stretches the quoted words, elastic though they be, beyond all reasonable limits. The test, as stated in McLeod v. Threlkeld, 319 U. S. 491, 497, 'is not whether the employee's activities affect or indirectly relate to interstate commerce but whether they are actually in or so closely related to the movement of the commerce as to be a part of it.'"

Under no stretch of the imagination can, therefore, be it said that the employees of defendant working in the project at issue here are engaged in commerce within the purview and intent of the act.

The complaint must be dismissed.

Opinion in the United States District Court for the District of Oregon in *Mitchell* v. *J. G. Watts Construction Co., et al.*, June 5, 1961

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

Consolidated Cases

Civil No. 198-59 and Civil No. 199-59

JAMES P. MITCHELL, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,

Plaintiff,

—v.—

J. G. WATTS CONSTRUCTION CO., a corporation, and
J. G. WATTS, an individual,

Defendants.

EAST, *J*.

JURISDICTION

These two companion cases before the Court in this matter involve actions brought by the Secretary of Labor, under 216(c) of the Fair Labor Standards Act (hereinafter referred to as "FLSA" or "Act"), 29 U. S. C. A. 216(c), as a result of alleged violations of the Act. Jurisdiction of this Court is based on 28 U. S. C. A. 1337 and 1345.

FACTS

Plaintiff, as Secretary of Labor, United States Department of Labor, has brought suit to enjoin Defendants, J. G. Watts Construction Company, a corporation, and J. G. Watts, its president, from violating the overtime and record-keeping requirements of the Fair Labor Standards Act.

Most of the facts are undisputed. On August 26, 1957, Watts contracted with the District Engineer, United States Army Engineer District, Seattle, Washington, for the construction of TM Site 179, being the Kalispell Air Force Station located approximately 12 miles south of Kalispell, Montana. On June 13, 1958, the same parties entered into a contract for the construction of a transmitter building at the Kalispell Air Force Station. On February 19, 1959, the parties entered into a third contract, this for the construction of additional water supply facilities at the station.

Kalispell Air Force Station is a radar facility, and is located in an area which was previously in the midst of a remote, completely uninhabited and mountainous area. It consists of two facilities: a cantonment facility and an operations facility. The cantonment facility was built at the 3500-foot elevation on forested land which was previously used only for grazing. From the cantonment area a two-lane road was constructed for 13.2 miles west and north, through virgin forest, to the top of a 7000-foot mountain where the operations facility was built. Prior to these station facilities, no buildings of any type existed at the operations-facility location, and the only buildings previously existing at or near the cantonment-facility location were a few scattered farmsteads.

The work performed by Defendant at the cantonment facility consisted of constructing two enlisted men's barracks, an officers' barracks, a mess hall, a community building, an administration building, a water tower, two pump houses, and a paint storage building. The work performed at the operations facility consisted of constructing the footing for the radar tower, an operations building, a power building, a transmitter-receiving building, a transmitter

building, a concrete pad, and a protective fence enclosing the operations area. Defendant company had nothing to do with the installation of the radar and other electronic and power equipment or the operation of the completed facilities. After completion of the construction work, the radar and other electronic and power equipment was installed in the buildings and operated by the United States Air Force.

Since the United States military forces began using aircraft, the Government has constantly been engaged in developing, operating and improving a national system for the navigational guidance and safety in flight of military aircraft. Such endeavor has now resulted in the use of radar, and the present military radar system in the continental United States is called "SAGE."

Within the geographical area known as the "Great Falls Ads," all radar installations report to the Great Falls Direction Center. The Great Falls Direction Center has been in operation as a manual center for several years and is presently being converted to automatic under the SAGE system. There are three principal radar installations presently reporting to the Great Falls Direction Center, all of which are currently manually operated and report by voice, but are being converted to automatic reporting under the SAGE system. The addition of other, new radar installations to the Great Falls Direction Center is planned. TM-178, at Lewiston, Montana, and TM-179 (the subject of this action) now have been constructed and were initially automatic in reporting to the Direction Center.

Subsequent to Defendant company's completing its construction work at the Kalispell Air Force Station, and after the United States Air Force's installation of the radar and other equipment, TM-179 transmits radar waves to

and receives information and intelligence from points outside the State of Montana. Such information and intelligence is used by the United States Air Force in the navigational guidance and safety of operation of military aircraft. In addition, the information and intelligence received from TM-179 is available to the Federal Aviation representative at the Direction Center in Great Falls, for use in the navigational guidance and safety of operation of civil and military aircraft flying under the jurisdiction of the Federal Aviation Agency. Also, TM-179 is equipped with two-way radio communication facilities, and military and civil airplane personnel are able to obtain weather information and locations in flight by voice from the Great Falls Direction Center.

In the performance of its construction work, Defendant company employed approximately 55 employees, nine of whom have not been paid compensation at a rate not less than one and one-half times their regular rate of pay for work in excess of 40 hours per week. Nor has the company kept and maintained wage and hour records for these nine employees, in accordance with the Act.

Thus, the issue is whether or not employees of Defendant company who were engaged in the construction of TM Site 179 are covered by the Fair Labor Standards Act of 1938, as amended.

Discussion

Section 7(a) of the FLSA, 29 U. S. C. A. 207(a), provides that

> "• • • no employer shall employ any of his employees who is *engaged in commerce* or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for

his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." [Emphasis supplied.]

"Commerce" is defined (in 29 U. S. C. A. 203(b)) to mean "trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof."

Applicability of the FLSA to employees engaged in construction generally (and construction of facilities of war or national defense in particular) has been a fertile area of litigation. Any attempt completely to harmonize the many decisions concerning coverage by the Act is virtually certain to end in less than total success.

One of the earlier cases touching on the problem was *Ritch* v. *Puget Sound Bridge & Dredging Co.*, 156 F. 2d 334 (CCA 9 Cir. 1946), in which the plaintiffs brought an action against their employers to recover overtime payments under the FLSA. The employers were dredging contractors engaged in deepening channels and otherwise improving the facilities at the Bremerton Navy Yard. In arriving at its decision, the Court of Appeals judicially noticed the many commercial uses of combat ships and of naval construction facilities. The commercial uses included communications, and transportation of goods, across state boundaries. It was upon the basis of these noticed facts that the court held the Act to be applicable. The plaintiff-employees were deemed to be employed "in commerce" because the work performed was the improvement of an existing facility of interstate commerce.

Opinion in Mitchell v. *J. G. Watts Construction Co., et al.,*
June 5, 1961

Another chapter in the history of the Act centers in the following four cases:

> *Aaron* v. *Ford, Bacon & Davis, Inc.*, 174 F. 2d 730 (CA 8 Cir. 1949);
> *Spencer* v. *Porter*, 174 F. 2d 731 (CA 8 Cir. 1949);
> *Brenna* v. *Federal Cartridge Corporation*, 174 F. 2d 732 (CA 8 Cir. 1949); and
> *United States Cartridge Co.* v. *Powell*, 174 F. 2d 718 (CA 8 Cir. 1949).

The *Aaron*, *Spencer*, *Brenna*, and *Powell* cases were held under submission by the Eighth Circuit Court of Appeals pending the United States Supreme Court's determination of *Kennedy* v. *Silas Mason Co.*, 334 U. S. 249 (1948), a case involving substantially similar issues. However, the Supreme Court remanded the latter case and withheld decision on the issue of coverage by the FLSA, awaiting a more solid basis of findings. Thereafter, the Court of Appeals for the Eighth Circuit rendered a lengthy opinion in the *Powell* case, in which the Walsh-Healy Act was held applicable to the exclusion of the FLSA. The *Aaron*, *Spencer*, and *Brenna* cases were then decided *per curiam*, on the basis of and in accordance with the court's decision in the *Powell* case. The *Powell* and *Aaron* cases, along with a case from the Fifth Circuit (*Creel* v. *Lone Star Defense Corp.*, 171 F. 2d 964 (CA 5 Cir. 1949)), were then taken to the Supreme Court. The Supreme Court reversed[1] the judgments of the Courts of Appeals, and held that the FLSA applies to employees of a private contractor at a Government-owned munitions plant operated by the contractor under a cost-plus-a-fixed-fee contract. However, the

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1 *Powell* v. *U. S. Cartridge Co.*, 339 U.S. 497 (1950).

basis of coverage by the Act was that the employees were engaged in the "production of goods for commerce." The Supreme Court's decision in the *Powell* case does not deal with the "engaged in commerce" clause of the Act, but it does serve as authority for the proposition that a military use of the work-product does not preclude application of the Act.

An interesting facet of the foregoing developments, one which is pertinent to the case at bar, is that the Eighth Circuit Court of Appeals made the following observation in the *Spencer* case:

> "While it was apparent that in so far as the claims of the [employees] were based on services rendered by them in connection with the *construction* of the arsenal, the [employees] were not within the coverage of the Act, the record indicated that they were claiming to have performed some services in connection with the actual production of munitions." [Emphasis supplied.]

The court had no difficulty whatsoever in rejecting the claim of coverage as to the construction services. It was only the claim based upon employment in *production* which the court deemed problematical, and it was the ruling in this latter connection which was reversed by the Supreme Court in the *Powell* case.

One of the most recent cases in point with the case at bar is *Mitchell v. Nolla, Galib & Compania*, 184 F. Supp. 919 (DC Puerto Rico 1960). That was a suit by the Secretary of Labor to enjoin a construction company's alleged violation of the FLSA. The facilities being constructed were not "facilities used or to be used in commerce, but merely military facilities exclusively destined to be used in the national defense by the Government of the United

States of America through the different branches of its armed forces." In holding the Act inapplicable, the court distinguished the following cases: *Laudadio* v. *White Construction Co.*[2] (on the ground that the airfield in that case was *assumed* to have continued to be an instrumentality of commerce after the Navy took it over); *Ritch* v. *Puget Sound Bridge & Dredging Co.*[3] (on the ground that the harbor was used as a facility for commercial transportation by both private and Navy vessels); and *Powell* v. *United States Cartridge Co.*[4] (on the ground that the *Powell* case dealt only with the "production of goods for commerce" clause in the Act). The propriety of distinguishing the *Powell* case on the ground stated is somewhat doubtful, in light of what has been stated by the Court of Appeals for the Fifth Circuit in the case of *Mitchell* v. *Empire Gas Engineering Co.*, 256 F. 2d 781 (CA 5 Cir. 1958). The latter case involved some construction at Homestead Air Force Base, which was owned by the United States and was part of the Strategic Air Command of the United States Air Force. The employer had contracted for the construction of jet bulk fuel storage tanks and fueling systems. The issue was whether or not the construction employees were "engaged in commerce." In connection with the distinction later made in *Mitchell* v. *Nolla, Galib & Compania, supra*, the Fifth Circuit Court of Appeals had this to say:

> "The difference between production of goods for commerce and the engaging in commerce are not such as

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2 163 F.2d 333 (CA 2 Cir. 1947).

3 156 F.2d 334 (CA 9 Cir. 1946).

4 339 U.S. 497 (1950).

> to exclude the latter from the rationale of the Powell decision. [Citation omitted.] An instrumentality of war is not, solely by reason of being such, excluded from being an instrumentality of commerce."

The court viewed the evidence in the *Empire* case as disclosing that "no regularly scheduled flights were made to or from the airport yet infrequent and intermittent landings and takeoffs were made by [commercial] airplanes, some of which came from or took off for points beyond the State of Florida." Further, both prior to and after the construction in question, "there were flights of Air Force planes to and from the airport which originated beyond Florida." Consequently, Empire and its construction employees were held to be subject to the Act, but on the ground that they "were engaged in the repair, reconstruction and extension of an existing instrumentality of commerce." In stating the law the court said:

> "Whether an employee is engaged 'in commerce' within the meaning of the Act is determined by practical considerations, not by technical conceptions. The test is whether the work is so directly and vitally related to the functioning of an instrumentality or facility of interstate commerce as to be, in practical effect, a part of it, rather than isolated local activity."

See also, *Mitchell* v. *Vollmer & Co.*, 349 U. S. 427 (1955).

Another case which is helpful is *Kam Koon Wan* v. *E. E. Black, Ltd.*, 188 F. 2d 558 (CA 9 Cir. 1951), an action under the Act for overtime benefits. It was there held that the employer, while engaged in constructing additions to the battery-charging system at Pearl Harbor Submarine Base, was, at most, improving "an existing

facility used to service an existing instrumentality 'in commerce.'" Such activity was said to be too remote from "commerce" to bring the employees' activities within the sphere of coverage by the Fair Labor Standards Act.

CONCLUSION

Without expressly deciding the question whether national defense operations are "commerce," it is the Court's decision that the employees involved herein were not "engaged in commerce." Therefore, they are not entitled to the benefits of the Fair Labor Standards Act. To paraphrase the opinion in the *Kam Koon Wan* case, the employees here were, at most, engaged in the construction of a new facility which subsequently would be connected with other such facilities for the purpose of performing communications services for existing instrumentalities of national defense. Although there is some dispute concerning the extent to which future services will be rendered to nonmilitary aircraft, it is obvious that the "sine qua non" of this construction was the use of the completed facilities for purposes of national defense. The work performed by these employees was too remote from any possible "commerce" to be considered a part of it. The construction work was *not* "so directly and vitally related to the functioning of an instrumentality or facility of interstate commerce as to be, in practical effect, a part of it, rather than isolated, local activity."

Accordingly, counsel for the Defendant company in the two cases is requested to submit order in conformity with the above.

DATED at Fairbanks, Alaska, this 5th day of June, 1961.

The Statutes, Regulations, and Decrees Involved

UNITED STATES CODE, TITLE 29

§202. Congressional finding and declaration of policy

(a) The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is declared to be the policy of this chapter, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the condition above referred to in such industries without substantially curtailing employment or earning power. June 25, 1938, c. 676, §2, 52 Stat. 1060; Oct. 26, 1949, c. 736, §2, 63 Stat. 910.

§203. • • •

"Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

§205. • • •

The Administrator shall as soon as practicable appoint a special industry committee to recommend the minimum

rate or rates of wages to be paid under §206 of this title to employees in Puerto Rico or the Virgin Islands * * * engaged in commerce or in the production of goods for commerce * * *

§206. Minimum wages; effective date

(a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) not less than $1 an hour;

(2) if such employee is a home worker in Puerto Rico or the Virgin Islands, not less than the minimum piece rate prescribed by regulation or order; * * *

* * * * *

(c) The provisions of paragraph (1) of subsection (a) of this section shall be superseded in the case of any employee in Puerto Rico or the Virgin Islands engaged in commerce or in the production of goods for commerce only for so long as and insofar as such employee is covered by a wage order heretofore or hereafter issued by the Administrator pursuant to the recommendations of a special industry committee appointed pursuant to section 205 of this title: *Provided*, That the wage order in effect prior to the effective date of this Act for any industry in Puerto Rico or the Virgin Islands shall apply to every employee in such industry covered by subsection (a) of this section until superseded by a wage order hereafter issued pursuant to the recommendations of a special industry committee appointed pursuant to section 205 of this title. June 25, 1938, c. 676, §6, 52 Stat. 1062; June 26, 1940, c. 432, §3 (e), (f), 54 Stat. 616; Oct. 26, 1949, c. 736, §6, 63 Stat. 912; Aug. 12, 1955, c. 867, §3, 69 Stat. 711.

United States Code, Title 29

§207. Maximum hours

(a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rates at which he is employed. • • •

§215. Prohibited Acts; prima facie evidence.

(a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person • • •

(2) to violate any of the provisions of section 206 or 207 of this title, or any of the provisions of any regulation or order of the Administrator issued under section 214 of this title.

§217. Injunction proceedings

The district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands shall have jurisdiction, for causes shown, to restrain violations of section 215 of this title: *Provided*, That no court shall have jurisdiction, in any action brought by the Secretary of Labor to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action. June 25, 1938, c. 676, §17, 52 Stat. 1069; Oct. 26, 1949, c. 736, §15, 63 Stat. 919, 1950 Reorg. Plan No. 6, §§1, 2, 15 F. R. 3174, 64 Stat. 1263.

29 Code of Federal Regulations, Part 671 (superseded)

Part 671—Communications, Utilities, and Miscellaneous Transportation Industries in Puerto Rico, Minimum Wage Order

* * * * *

§ 671.1 *Approval of recommendation of industry committee.* The committee's recommendation is hereby approved.

§ 671.2 *Wage rate.* Wages at a rate of not less than 40 cents per hour shall be paid under section 6 of the act by every employer to each of his employees in the communications, utilities, and miscellaneous transportation industries in Puerto Rico who is engaged in commerce or in the production of goods for commerce.

§ 671.3 *Posting of notices.* Every employer employing any employees so engaged in commerce or in the production of goods for commerce in the communications, utilities, and miscellaneous transportation industries in Puerto Rico shall post and keep posted in a conspicuous place in each department of his establishment where such employees are working such notices of this order as shall be prescribed from time to time by the Wage and Hour Division of the United States Department of Labor.

§ 671.4 *Definition of the communications, utilities, and miscellaneous transportation industries in Puerto Rico.* The communications, utilities, and miscellaneous transportation industries in Puerto Rico, to which this part shall apply, is hereby defined as follows:

The industry carried on by any wire or radio system of communication or by messenger service; by any concern engaged in the production and distribution of gas, electricity or steam; the distribution of water or the operation

of sanitation facilities; and by any concern engaged in transportation by rail, pipeline, motor vehicle, or other means, or in related activities including stevedoring, consolidating, forwarding, crating and boxing:

Provided, however, That the definition shall not include any activity included in any other industry defined in Administrative Order 344 appointing Special Industry Committee No. 4 for Puerto Rico, as amended (10 F. R. 5332, 7346) (and in Parts 670-680, inclusive, of this chapter), or included in the definitions of the wage orders applicable in Puerto Rico for the railroad and property carrier industry, the shipping industry, the sugar manufacturing industry, or any other industries in Puerto Rico for which wage orders have been issued.

29 Code of Federal Regulations, Part 672 (superseded)

Part 672—Construction, Business Service, Motion Picture, and Miscellaneous Industries in Puerto Rico, Minimum Wage Order

* * * * *

§ 672.1 *Approval of recommendations of industry committee.* The committee's recommendations and each of them are hereby approved.

§ 672.2 *Wage rates.* (a) Wages at a rate of not less than 40 cents per hour shall be paid under section 6 of the Fair Labor Standards Act of 1938 by every employer to each of his employees in the motion picture, business service, and miscellaneous industries division of the construction, business service, motion picture, and miscellaneous industries in Puerto Rico who is engaged in commerce or in the production of goods for commerce.

29 Code of Federal Regulations (superseded)

(b) Wages at a rate of not less than 32 cents per hour shall be paid under section 6 of the Fair Labor Standards Act of 1938 by every employer to each of his employees in the construction division of the construction, business service, motion picture, and miscellaneous industries in Puerto Rico who is engaged in commerce or in the production of goods for commerce.

§ 672.3 *Posting of notices.* Every employer employing any employees so engaged in commerce or in the production of goods for commerce in the construction, business service, motion picture, and miscellaneous industries in Puerto Rico shall post and keep posted in a conspicuous place in each department of his establishment where such employees are working such notices of this order as shall be prescribed from time to time by the Wage and Hour Division of the United States Department of Labor.

§ 672.4 *Definitions of the construction, business service, motion picture, and miscellaneous industries in Puerto Rico and its divisions.* The construction, business service, motion picture, and miscellaneous industries in Puerto Rico, to which this part shall apply, is hereby defined as follows:

Construction of buildings, structures and other improvements (including designing; reconstruction; alteration; repair and maintenance; assembling and installation at the construction site of machinery and other facilities; and dismantling, wrecking or other demolition); the production and distribution of motion pictures; the production of photographs and blue prints; the activity carried on by any business or nonprofit enterprise performing real estate, professional, advertising, education or research activities, or engaged in the furnishing of other facilities

or services to industrial or commercial establishments or the consumer:

Provided, however, That the definition shall not include construction carried on by persons, for their own use or occupancy, who are principally engaged in another industry, or any activity covered by the wage order applicable in Puerto Rico for the banking, insurance and finance industries.

The separable divisions of the industry as defined in this section, to which this part and its several provisions shall apply, are hereby defined as follows:

(a) *Construction division.* This division consists of the construction (except when carried on by persons, for their own use or occupancy, who are principally engaged in another industry) of buildings, structures, and other improvements, including, but without limitation, designing, reconstruction, alteration, repair and maintenance, assembling and installation at the construction site of machinery and other facilities, and dismantling, wrecking or other demolition.

(b) *Motion picture, business service, and miscellaneous industries division.* This division consists of the production and distribution of motion pictures; the production of photographs and blue prints; the activity carried on by any business or nonprofit enterprise performing real estate, professional, advertising, education or research activities, or engaged in the furnishing of other facilities or services to industrial or commercial establishments or the consumer: *Provided, however,* That this division shall not include any activity covered by the wage order applicable in Puerto Rico for the banking, insurance and finance industries.

29 Code of Federal Regulations (current)

Part 671—Communications, Utilities, and Transportation Industry in Puerto Rico [Revised]

* * * * *

§ 671.1 *Definition.* The communications, utilities, and transportation industry in Puerto Rico, to which this part shall apply, is defined as the industry carried on by any wire or radio system of communication, or by messenger service; by any concern engaged in the production and distribution of gas, electricity, or steam, the distribution of water, or the operation of sanitation facilities; and by any concern engaged in transporation for compensation by air, water, rail, motor vehicle, pipeline, or other means, or in related activities, including the operation of travel bureaus and ticket agencies, stevedoring, consolidating, forwarding, crating, and boxing: *Provided, however,* That the industry shall not include railroad transportation activities carried on by a producer of raw sugar, can juice, molasses, refined sugar, and incidental by-products (or by any firm owned or controlled by or owning and controlling such producer, or by any firm owned or controlled by the parent company of such producer), where the railroad transportation activities are in whole or in part used for the production or shipment of these products, and any transportation activities by truck or other vehicle performed by a producer of these products in connection with the production or shipment of such products by such producer.

§ 671.2 *Wage rates.* (a) Wages at a rate of not less than $1.00 an hour shall be paid under section 6 of the Fair Labor Standards Act of 1938 by every employer to each of his employees in the communications, utilities, and transportation industry in Puerto Rico, who is engaged in commerce or in the production of goods for commerce and who is engaged in the radio broadcasting classifica-

tion of that industry, which is defined as consisting of the operations carried on by any firm engaged in radio broadcasting in Puerto Rico.

(b) Wages at a rate of not less than $1.00 an hour shall be paid under section 6 of the Fair Labor Standards Act of 1938 by every employer to each of his employees in the communications, utilities, and transportation industry in Puerto Rico, who is engaged in commerce or in the production of goods for commerce and who is engaged in the drivers, mechanics, and clerical workers in motor carrier transport and express classification of that industry, which is defined as consisting of the work or operations performed by drivers or operators of all motor vehicles, including fork-lift trucks; mechanics, body repair men, solderers, and tinsmiths; and dispatchers and clerical workers engaged in the transportation of property for compensation including pickup and delivery, and activities directly related to the transportation of property by motor vehicle for compensation, and consolidating, forwarding, packing, crating, and boxing goods for shipment.

(c) Wages at a rate of not less than 90 cents an hour shall be paid under section 6 of the Fair Labor Standards Act of 1938 by every employer to each of his employees in the communications, utilities, and transportation industry in Puerto Rico, who is engaged in commerce or in the production of goods for commerce and who is engaged in the other workers in motor carrier transport and express classification of that industry, which is defined as consisting of the work or operations performed by all workers other than those included in the drivers, mechanics and clerical workers in motor carrier transport and express classification engaged in the transportation of property for compensation, including pickup and delivery, and activities directly related to the transportation of property by motor vehicle for

compensation and consolidating, forwarding, packing, crating, and boxing goods for shipment.

[illegible] of the Fair Labor Standards Act of 1938 by every employer to each of his employees in the communications, utilities, and transportation industry in Puerto Rico, who is engaged in commerce or in the production of goods for commerce and who is engaged in the general classification of that industry, which is defined as all activities included in the communications, utilities, and transportation indsutry in Puerto Rico as defined in § 671.1, except activities included in the radio broadcasting classification and the motor carrier transport and express classification of that industry, as these classifications are defined in this section.

§ 671.3 *Notices.* Every employer subject to the provisions of § 671.2 shall post in a conspicuous place in each department of his establishment where employees subject to the provisions of § 671.2 are working such notices of this part as shall be prescribed from time to time by the Administrator of the Wage and Hour Division, the United States Department of Labor, and shall give such other notice as the Administrator may prescribe.

29 Code of Federal Regulations (current)

Part 672—Construction, Business Service, Motion Picture, and Miscellaneous Industry in Puerto Rico [Revised]

• • • • •

§ 672.1 Definition.

The construction, business service, motion picture, and miscellaneous industry in Puerto Rico to which this part

shall apply is defined as the design, construction, reconstruction, alteration, repair, and maintenance of buildings, structures, and other improvements; the assembling at the construction site and the installation of machinery and other facilities in or upon buildings, structures, and other improvements; the dismantling, wrecking, or other demolition of buildings, structures, and other improvements; the activity carried on by any business or nonprofit enterprise performing real estate, professional, advertising, education, or research activities, or engaged in the furnishing of other facilities or services to industrial or commercial establishments or to the consumer; the production of photographs and blueprints; the production and distribution of motion pictures and all activities incidental thereto; and all activities which are not included in the definition of other industries in Puerto Rico for which wage orders have been issued: *Provided, however,* That the industry shall not include any activity carried on by an establishment primarily engaged in another industry for its own use, or any activity included in the definition of any industry in Puerto Rico for which a wage order has been issued.

§ 672.2 Wage rates.

(a) * * * Wages at a rate of not less than $1.00 an hour shall be paid under section 6 of the Fair Labor Standards Act of 1938, as amended, by every employer to each of his employees in the business service, motion picture, industrial and other building construction and special trade contractors, and miscellaneous industry classification of the construction, business service, motion picture, and miscellaneous industry in Puerto Rico, who is engaged in commerce or in the production of goods for commerce, and this classification shall be defined as the activity carried on by any business or nonprofit enterprise performing real

estate, professional, advertising, education or research activities, or engaged in the furnishing of other facilities or services to industrial or commercial establishments or to the consumer, and the production of photographs and blueprints (except activities included in the remaining classifications of this industry as defined in paragraphs b and c of this section); the production and distribution of motion pictures and all activities incidental thereto; all activities connected with the construction (including new work, additions, alterations, demolition, and repair) of buildings such as industrial, commercial, institutional, and public buildings, electric power plants, natural gas compressing stations, oil pumping stations and similar building construction, the installation or construction of access roads and similar facilities, furnaces, kilns, and similar appurtenances of industrial plants, and the assembling at the construction site and the installation of machinery in or upon buildings, structures, and other improvements, and with the work performed by contractors who specialize in activities such as plumbing, heating, decorating, electrical work, foundation work, the erection or servicing of building equipment, such as elevators, and other related construction specialties including the installation of insulation and air conditioning; and all activities which are not included in the definition of other industries in Puerto Rico for which wage orders have been issued: *Provided, however,* That this classification shall not include any activity carried on by an establishment primarily engaged in another industry for its own use, or any activity included in the definition of any industry in Puerto Rico for which a wage order has been issued.

(b) Janitorial service classification.

* * * * *

(c) Highway and street and other heavy construction and other service classification. Wages at a rate of not less than

$1.00 an hour shall be paid under section 6 of the Fair Labor Standards Act of 1938, by every employer to each of his employees in the construction, business service, motion picture, and miscellaneous industry in Puerto Rico, who is engaged in commerce or in the production of goods for com-

his employees in the construction
picture, and miscellaneous indus
engaged in commerce or in the pr
merce, who is also engaged in th
other heavy constructions and o
which is defined as all work (incl
alterations, demolition, and repa
tion with heavy construction, incl
the construction of roads, streets,
ways, parking areas, airport ru
the construction of sewers and wa
tions, elevated highways, bridge
passes, dredging and harbor faci
provements and other marine con
the activity carried on by any bus
ing and exterminating, custodial
and related services for industrill
lishments or for the consumer exc
janitorial service classification:
this classification shall not include
carried on by an establishment prin
industry for its own use.

§ 672.3 Notices.

Every employer subject to the p
post in a conspicuous place in each
lishment where employees subjec
§ 672.2 are working such notices
prescribed from time to time by t
Wage and Hour and Public Con
United States Department of Lab
other notice as the Administrator m

bgaged in the highway and street and
otions and other service classification,
work (including new work, additions,
n, and repair) performed in connec-
ruction, including, but not limited to,
ads, streets, guard rails, fences, park-
airport runways, and related work,
wers and water mains, heavy founda-
ays, bridges, overpasses and under-
harbor facility construction and im-
marine construction operations, and
by any business providing disinfect-
g, custodial and watchman services,
for industrial or commercial estab-
onsumer except those included in the
ssification: *Provided, however,* That
not include any construction activity
lishment primarily engaged in another
use.

ubject to the provisions of § 672.2 shall
place in each department of his estab-
loyees subject to the provisions of
such notices of this part as shall be
e to time by the Administrator of the
d Public Contracts Divisions of the
rtment of Labor and shall give such
dministrator may prescribe.

Laws of Puerto Rico, Annotated, Title 29

§245. Declaration of principles

(*a*) The Legislature of Puerto Rico hereby finds that the existence of substandard wages, hours of work and other working conditions in industry (1) is detrimental to the health, efficiency and general well-being of workers; (2) is detrimental to the sound and full development of economy; (3) constitutes an unfair method of competition in production and trade; (4) leads to disputes between workers and employers which obstruct the progressive development of Puerto Rican economy; and (5) represents a state of manifest social injustice.

(*b*) It is hereby declared to be the policy of the Commonwealth of Puerto Rico as rapidly as possible to eliminate substandard working conditions in industries; promote living, health and safety standards for workers; step up the development of agriculture, industry and businesses in Puerto Rico; eliminate unfair competition, and achieve the highest possible wage level compatible with such development, without substantially curtailing employment or impairing the opportunities to obtain the highest wages.

(*c*) It is hereby further declared to be the policy of sections 245-246m of this title to maintain the necessary flexibility in the fixing of minimum wages so as to insure for the workers the highest wage that the economic conditions of the industry will permit; and that the minimum wages in each business, industry or occupation be revised at least once every two years until attaining, as rapidly as is economically possible, a minimum wage of $1.00 per hour in all industries.

§245i. Minimum wage committees

(*a*) Whenever the Board shall consider necessary the fixing or revising of minimum wages in any industry, its Chairman shall for such purposes appoint a Minimum Wage Committee composed of an equal number of persons representing the public, the employers, and the workers' interest. In case the Committee so appointed is composed of an even number of members, the Chairman of the Board shall, furthermore, designate to form a part of the Committee an additional member representing the public interest, who may participate in the hearings just like any other member of the Committee. The additional member shall attend and participate in the deliberations, decisions and voting of the Committee only when the Committee is unable to recommend a draft decree due to a tie vote and his presence and intervention is summoned by at least one-half of the members integrating the Committee. The additional member shall not be counted to form a quorum until he is summoned to intervene to settle a tie, as herein provided.

(*b*) In the case of industries covered by the Fair Labor Standards Act of 1938, as amended, the Chairman may designate as members of a minimum wage committee residents of any State of the United States or of the District of Columbia. Whenever the Chairman decides to appoint such members, he shall designate a number of representatives of the public interest, of the employers and of the employees of the industry concerned equal to the number of members designated from Puerto Rico for each such representation. The Chairman of the Board shall, furthermore, designate to form a part of the Committee an additional member representing the public interest, who may

participate in the hearings just like any other member of the Committee. The additional member shall attend and intervene in the deliberations, decisions and voting of the Committee only when the Committee is unable to recommend a draft decree due to a tie vote and he is summoned to attend and intervene by at least one-half of the members integrating the Committee. The additional member shall not be counted to form a quorum until he is summoned to intervene to settle a tie, as herein provided.

Mandatory Decree of Puerto Rican Minimum Wage Board

Commonwealth of Puerto Rico
Department of Labor
San Juan, P. R.

MINIMUM WAGE BOARD

MANDATORY DECREE NUMBER 44
APPLICABLE TO

THE CONSTRUCTION INDUSTRY

Article I—Application

This mandatory decree is applicable to all employees in "*The Construction Industry*", as defined in Article II, with the exception of managers, executives, and professionals, as these terms are defined or be defined in the future by the Minimum Wage Board of Puerto Rico.

Article II—Definition of the Industry

"*The Construction Industry*" to which this mandatory decree applies, is defined as follows:

> "*The Construction Industry* shall comprise: without limitation, every act, process, operation, work or service necessary or incidental, or related to the designing, project, fabrication, reconstruction, alteration, repair, conservation or maintenance of buildings, works or constructions. It shall also comprise the assembling or installation at the construction site of any machinery or device and likewise the dismantling, wrecking or demolition of said works, constructions or buildings and the removal of devices or machinery installed in these.

The concept "building", "work" or "construction" includes without limitation: houses, establishments, and factories; roads, streets, bridges, viaducts, railroads, and every other means of communication; sewers, aqueducts, water mains and pipe lines; canals, excavations, borings, tunnels, and dams; construction and improvement of ports and waterways; of airports and airfields; of transmission lines; and works of reduction of lands, drainage, drying, irrigation and flood control.

The works, buildings or constructions (as well as the repair and conservation of the same) made by force account for purely agricultural purposes are excluded from this industry.

Likewise are excluded, when made by force account, the reparation, conservation, maintenance, dismantling, wrecking or demolition of works, constructions, or buildings used or until recently being used or to be used again in relation to any industry, business or service covered by a mandatory decree of the Minimum Wage Board of Puerto Rico or by any wage order issued under the Federal Labor Standards Act."

SEP 28 1961
JAMES R. BROWNING, Clerk

No. 376

In the Supreme Court of the United States

OCTOBER TERM, 1961

FIVE BORO CONSTRUCTION CORPORATION, PETITIONER

v.

ARTHUR J. GOLDBERG, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
Department of Justice,
Washington 25, D.C.

CHARLES DONAHUE,
Solicitor,
HORTON LAPPIN,
Assistant Solicitor,
BEATH HEDGE,
Attorney,
Department of Labor,
Washington 25, D.C.

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In the Supreme Court

OCTOBER TE

No. 3

FIVE BORO CONSTRUCTION C

v.

ARTHUR J. GOLDBERG, S
UNITED STATES DEPA

ON PETITION FOR A WRIT OF C
STATES COURT OF APPEALS

BRIEF FOR THE RESPONI

OPINIONS B

The opinion of the Court
1a–6a) is reported at 291 F
Court's opinion (Pet. App.
reported.

JURISDICT

The judgment of the Court
on June 15, 1961 (Pet. App.
writ of certiorari was filed o
jurisdiction of this Court is
1254(1).

QUESTION PRE

Whether employees engag
of the receiver, transmitter,

upreme Court of the United States

OCTOBER TERM, 1961

No. 376

O CONSTRUCTION CORPORATION, PETITIONER

v.

UR J. GOLDBERG, SECRETARY OF LABOR,
ITED STATES DEPARTMENT OF LABOR

N FOR A WRIT OF CERTIORARI TO THE UNITED
COURT OF APPEALS FOR THE FIRST CIRCUIT

F FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

inion of the Court of Appeals (Pet. App.
reported at 291 F. 2d 371. The District
pinion (Pet. App. 7a–9a) is not officially

JURISDICTION

gment of the Court of Appeals was entered
15, 1961 (Pet. App. 6a). The petition for a
ertiorari was filed on August 31, 1961. The
on of this Court is invoked under 28 U.S.C.

QUESTION PRESENTED

er employees engaged in the construction
eceiver, transmitter, communication center,

and supporting buildings for a communications relay center, to become part of an existing world-wide network operated by the United States Army Signal Corps, are engaged "in commerce" within the meaning of the Fair Labor Standards Act.

STATUTE INVOLVED

The pertinent portions of the Fair Labor Standards Act of 1938 (c. 676, 52 Stat. 1060), as amended (29 U.S.C. 201 *et seq.*), are set forth in the appendix to the petition, pp. 25a–27a.

STATEMENT

This action was brought by the Secretary of Labor under Section 17 of the Fair Labor Standards Act to enjoin petitioner from violating the minimum wage and overtime provisions of the Act with respect to employees engaged in the construction of various buildings and supporting facilities for a communications relay center at Fort Allen in Puerto Rico, which was to provide a link in an existing world-wide, tropical communications network (R. 3–5).

This network had been established by the Signal Corps after discovering that radio transmission east and west was most reliable near the equator and least subject to the hazards of magnetic storms caused by sunspots (R. 13–14). The existing network utilized stations in Hawaii, the Philippines, and Asmara, Eritrea (R. 14). In order to close the gap which remained south of Washington, Fort Allen in Puerto Rico was chosen as the site of the fourth station in this world-wide network (R. 12, 14).

Petitioner's work in connection with the establishment of the radio relay center at Fort Allen was

performed under two contracts which covered the construction of various technical buildings, including the receiver, transmitter, and communications center buildings, with their three associated power stations, and supporting facilities, including a telephone building, an administration building, gas stations, mechanical repair shops, troop quarters, mess halls, and the electric, sewage, and water systems (R. 11, 12, 23, 30, 33, 34).

The communications center in Puerto Rico will not originate messages, but will operate as a relay station the function of which is to receive signals from outlying posts, re-shape the waves to eliminate static, and retransmit them to the north, south, east, or west (R. 14). The circuits will be used by United States government agencies for communications of a strategic and logistic nature (R. 15, 18). Before the establishment of Fort Allen, this traffic was handled by the three existing stations. Traffic originating in Washington and the United States was transmitted in a higher latitude with very poor reliability (R. 15).

The district court held that petitioner's employees were not engaged in commerce within the meaning of the Fair Labor Standards Act because petitioner's contracts provided for the construction of communication facilities which "would carry messages solely to and from governmental agencies and would not receive or transmit commercial messages except in emergencies" (R. 34, 35). The court also noted that petitioner's construction activities would have to be supplemented by additional work to be performed by other parties before the radio center could commence its operations (R. 34). The court of appeals reversed,

pointing out that "the distinction between new construction and repairs has been expressly rejected by the Supreme Court as a determinative touchstone whereby to decide the coverage of the Act" (Pet. App. 5a), and that the "distinction between instrumentalities held by the government exclusively for war purposes and those in commercial use * * * was in effect disapproved in *Powell* v. *United States Cartridge Co.*, 339 U.S. 497 (1950)" (Pet. App. 3a). The work of petitioner's employees in constructing buildings for the communications center, the court held, was sufficiently "closely related to commerce" to bring them within the coverage of the Act.

ARGUMENT

The main thrust of the petition is that the "in commerce" coverage of the Fair Labor Standards Act applies only to commercial activities and, therefore, that a world-wide communications network to be used exclusively for government purposes is not an instrumentality of commerce within its scope. It is also argued that, since petitioner's contracts did not call for completion of the installation, its construction work was too remote from commerce to be considered a part of it.[1]

We submit that the decision below correctly applies the controlling decisions of this Court in *Powell* v.

[1] Petitioner contends further that the Puerto Rican Minimum Wage Law, rather than the Fair Labor Standards Act, is applicable. This argument deserves no attention since the local decree for the Puerto Rican construction industry, by its own terms, has no application to "any industry, business or service covered by * * * any wage order issued under the Fair Labor Standards Act" (Pet. 27, 42a).

United States Cartridge Co., 339 U.S. 497; *Mitchell* v. *Vollmer & Co.*, 349 U.S. 427; and *Mitchell* v. *Lublin, McGaughy & Asso.*, 358 U.S. 207. It presents no novel problem which would warrant review by this Court.

1. Petitioner's contention that the world-wide communications network is not an instrumentality of commerce because it is used for war or defense, rather than for private commercial purposes, is foreclosed by this Court's decision in *Powell* v. *United States Cartridge Co.*, 339 U.S. 497, that the manufacture of munitions to be shipped abroad and consumed by the United States military forces is production for commerce. The suggestion that the rationale of the *Powell* case was limited to the *production* of munitions is repudiated by this Court's holding in *Mitchell* v. *Lublin, McGaughy & Asso.*, *supra*, that "under the Court's reasoning in *Powell* * * * a facility designed for war may also be an instrumentality of commerce" (358 U.S. at 213). See also *Mitchell* v. *Empire Gas Engineering Co.*, 256 F. 2d 781 (C.A. 5); *Mitchell* v. *Blanchard*, 272 F. 2d 574 (C.A. 5); *Mitchell* v. *Owen*, 292 F. 2d 71 (C.A. 6); *Mitchell* v. *H. B. Zachry Company*, 127 F. Supp. 377 (D.N.M.) (cited with approval in *Lubin supra*).

The post-*Powell* decisions cited by petitioner as conflicting with the holding below (Pet. 14–15) did not rest upon any asserted distinction between "war" and "commerce" but upon the ground that the work of the employees consisted of "new" construction rather than repair of existing structures. These decisions, which may be in conflict with the decision

below, do not now provide any basis for review, since this Court has subsequently "expressly rejected the 'new construction' rule" as a ground for denying the Act's coverage. *Michell* v. *H. B. Zachry Co.*, 362 U.S. 310, at 313; see also *Mitchell* v. *Vollmer & Co.*, *supra*, 349 U.S. at 429; *Mitchell* v. *Lublin, McGaughy & Asso.*, *supra*, 358 U.S. at 213.

2. Petitioner's claim that its construction is too remote to be considered a part of commerce because it did not build a wholly completed facility is similarly at odds with the decisions of this Court. The holding below correctly applies the principle—settled by *Mitchell* v. *Vollmer & Co.*, 349 U.S. 427, and re-affirmed in *Mitchell* v. *Lublin, McGaughy & Asso.*, 358 U.S. 207—that employees performing work which is an integral part of a project for the improvement of an instrumentality or facility of interstate commerce are "engaged in commerce" within the meaning of the Fair Labor Standards Act.

The radio relay station at Fort Allen was designed and constructed for the specific purpose of closing a gap in the existing tropical communications belt stretching from Hawaii to the Philippines to Asmara, Eritrea—a communications system which was plainly an instrumentality of "commerce" as defined in Section 3(b) of the Act.[2] The construction of the buildings and utilities necessary for the establishment of this station was as much a part of "the work of improving existing facilities of interstate commerce"

[2] "'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof." 29 U.S.C. § 203(b).

(see *Vollmer*, 349 U.S. at 430), as was the construction of an earthwork embankment and concrete platform for the new lock in an existing interstate waterway held covered in *Vollmer*, or the "preparation of plans for guidance" in the construction of improvements to various interstate instrumentalities held covered in *Lublin*. The holding that the particular construction in *Mitchell* v. *H.B. Zachry Co.*, *supra*, was not "closely related" or "directly essential" to production for commerce is not relevant here since the Court expressly distinguished its *Zachry* ruling from the prior *Vollmer* and *Lublin* decisions on the ground that the former did not involve construction work relating to "a facility of 'commerce' ", but of a dam which in itself was neither a facility of "commerce" nor a facility of "production" but would, on completion, merely support production facilities, 362 U.S. at 319–320.

The decision below also accords with a consistent line of decisions in the other courts of appeals, since *Vollmer*, upholding the coverage of comparable phases of construction projects designed to improve the functioning of existing interstate instrumentalities. *Mitchell* v. *Hodges Contracting Co.*, 238 F. 2d 380 (C.A. 5) (construction of new building to house an existing radio station and a newly licensed television station); *Mitchell* v. *Southwest Engineering Co.*, 271 F. 2d 427 (C.A. 8) (construction of buildings to house high frequency radio equipment for the guidance and control of airplane traffic at airports); *Archer* v. *Brown & Root, Inc.*, 241 F. 2d 663 (C.A. 5), certiorari denied, 355 U.S. 825 (all phases—including

erection of a construction site plant for the production of necessary materials—of a new causeway project designed to relieve traffic congestion on existing highways); *Mitchell* v. *Brown Engineering Co.*, 224 F. 2d 359 (C.A. 8), certiorari denied, 350 U.S. 875 (preparation of plans and specifications for highway improvement projects); *Mitchell* v. *Emala & Associates*, 274 F. 2d 781 (C.A. 4) (depositing fill dirt at site of highway improvement).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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CHARLES DONAHUE,
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SEPTEMBER 1961.

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IN THE

Supreme Court of the United States

October Term, 1961

No. 376

FIVE BORO CONSTRUCTION CORPORATION,

—against—

ARTHUR J. GOLDBERG, Secretary of Labor, United States Department of Labor,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR PETITIONER

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ONSTRUCTION CORPORATION,

Petitioner

ON PETITION FOR A WRIT

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Respondent.

REPLY BRI

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ALS FOR THE FIRST CIRCUIT

F FOR PETITIONER

It is the purpose of t is Reply Brief to demonstrate the failure of the Respond t to touch upon the crucial ques- tions raised in the Peti on for a Writ of Certiorari, and upon the conflict betwe the Circuits on those questions.

As correctly indicate by Respondent, the main thrust of the Petition is (1) th construction of facilities for the national defense is not overed by the Fair Labor Stand- ards Act and (2) even f it were, the construction here involved was too remot rom the finished product to bring the work within the ch nnels of commerce; although we believe our Point II, sug sting that the decision below runs counter to applicable t ritorial law, is also meritorious.

The cases cited by Petitioner in its Petition (Petrs. p. 21) which clearly develop the conflict between the Circuits on the first question, i.e., *Spencer* v. *Porter*, 174 F. (2d) 731; *Cooper* v. *Rust Engineering Co.*, 187 F. (2d) 732; *Mitchell* v. *J. G. Watts Construction Co. et al.*, 15 W. H. 112, —— F. Supp. —— (D. C. D. Ore. 1961) on the one hand, and the Court of Appeals for the First Circuit, on the other, have nevertheless gone untouched by Respondent's hands.

There is an attempt to brush aside the language of this Court in *Mitchell* v. *H. B. Zachry*, to the effect that

> "The combination of the remoteness of this construction from production, and the absence of a dedication of the completed facilities either exclusively or primarily to production, persuades us that the activity is not 'closely related' or 'directly essential' to production for commerce," 362 U. S. 310 at 321,

on the ground that in *Zachry*, as stated in the opinion, the construction was of a dam which even when completed would be neither a "facility of commerce" nor a facility for the production of goods for commerce, but would only ***support*** production of goods for commerce.

If construction of a dam—the purpose of which is to preserve water for industrial and commercial use and for the water we drink—is not commerce within the meaning of the Fair Labor Standards Act, surely the Government will not contend that the construction of a facility to guard and protect our sacred heritage, our cherished liberty and the freedom of the very air we breathe, is commerce within the Act!

Finally, there are cited in the closing paragraph of Respondent's Memorandum five cases which, even upon Respondent's brief analysis appear to be altogether askew from the issues here involved. They all involved construc-

tion of highly commercialized facilities—radio and television, airports, causeways and highways.

Perhaps the most telling proof of the seriousness of the conflict between the circuits, upon which the Respondent's brief has conspicuously failed to touch, is Judge East's language in the *Watts* case, set forth in the Appendix to our main brief, at page 19a:

> "Applicability of the FLSA to employees engaged in construction generally (and construction of facilities of war or national defense in particular) has been a fertile area of litigation. Any attempt completely to harmonize the many decisions concerning coverage by the Acts is virtually certain to end in less than total success."

Respondent presents no reason why such a state of affairs should have to continue.

The necessity for defense construction is even at this writing a dire one and and one which unfortunately looms larger over the horizon with the twilight of every passing day.

In this state of affairs, we believe certiorari and the full exploration of the issues by this Court, with final resolution and determination of the conflict between the circuits, is warranted.

Dated: New York, N. Y.
October 10, 1961

Respectfully submitted,

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